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In The Supreme Court of the United States

RICKEY CLARK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

The Controlled Substances Act, 21 U.S.C. § 841(b), creates a staircase of escalating sentencing ranges predicated on drug quantity. Based on the district court's finding of drug quantity by a preponderance of the evidence, petitioner Rickey Clark was sentenced to the mandatory minimum ten-year term under § 841(b)(1)(A), which carried a maximum of life in prison. The district court acknowledged that the government failed to prove drug quantity beyond a reasonable doubt. Had the reasonable doubt burden applied, Clark would have been sentenced to a term of four years under § 841(b)(1)(C), which carried a sentencing range of zero to twenty years for offenses involving unspecified drug quantities. The questions presented are:

1. Whether a criminal defendant can be sentenced to a mandatory minimum and exposed to an increased maximum under 21 U.S.C. §§ 841(b)(1)(A) or -(b)(1)(B) based upon facts the government is unable to prove beyond a reasonable doubt. As the Seventh Circuit acknowledged in this case, the courts of appeals are divided on this question.

2. Whether the holding of *Harris v. United States*, 536 U.S. 545 (2002), that facts triggering a mandatory minimum may be found by the trial judge by a preponderance of the evidence, remains good law.

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The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 538 F.3d 803 and reprinted in the Appendix to this petition.[1] App. 1a-22a. The order of the United States District Court for the Northern District of Illinois is unreported. App. 23a-28a.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Pertinent provisions are set out in the Appendix. App. 29a-42a.

STATEMENT OF THE CASE

This case raises important, recurring questions affecting numerous drug prosecutions in the federal courts. Under the Controlled Substances Act, 21 U.S.C. § 841, the sentence is largely dictated by the quantity of drugs attributed to the defendant. Section 841(b) contains three subsections, each containing its own sentencing range. A finding of drug quantity determines whether the defendant is sentenced under one subsection or another, and hence what minimum and maximum

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[1] Citations are to the Appendix to this Petition ("App."), to the appendix integrated into Petitioner's brief to the Seventh Circuit ("C.A. Integrated App."), and to the separate appendix to Petitioner's brief to the Seventh Circuit ("C.A. Separate App.").

penalties apply. Yet, as the Seventh Circuit acknowledged below, the courts of appeals are divided on whether drug quantity is an element of the offense that the government must prove to the jury beyond a reasonable doubt, or a sentencing factor that may be determined by the court by a preponderance of the evidence.

When the finding of drug quantity moves the defendant up the staircase of subsections, exposing him to both a higher mandatory minimum and a higher statutory maximum, the Second and Ninth Circuits require that the government prove drug quantity to a jury beyond a reasonable doubt. In the remaining circuits, drug quantity is sometimes an element of the offense and sometimes a sentencing factor, depending on the sentence ultimately imposed: When the sentence is below the maximum penalty authorized by the statute absent proof of drug quantity (the "default" statutory maximum under § 841(b)(1)(C)), drug quantity is a sentencing factor, but when the sentence is above the default statutory maximum, drug quantity is an element of the offense. Accordingly, in these circuits, whether drug quantity is an element or a sentencing factor is determined after sentencing, and thus the burden of proof remains unknown until the evidence has been submitted, the finding made, and the sentence imposed.

The split among the circuits reflects their differing interpretations of this Court's opinions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny, specifically whether the Fifth and Sixth Amendment rights protected by *Apprendi* attach when judicial fact-finding exposes a defendant to a higher statutory maximum, or only when the defendant is actually sentenced beyond the default statutory maximum.

The circuit courts are also divided regarding whether, as a matter of statutory interpretation, drug quantity is an element of an aggravated offense under §§ 841(b)(1)(A) or -(b)(1)(B). The appellate courts have come to different interpretations of the language, structure, and legislative history of the Controlled Substances Act.

Finally, the circuit split also reflects disagreement over the scope of *Harris v. United States*, 536 U.S. 545 (2002). Specifically, the circuit courts are divided on whether this Court's decision in *Harris*, allowing trial judges to find by a preponderance of the evidence facts triggering a statutory mandatory minimum penalty, applies when the judicially-found facts also expose the defendant to the risk of a higher maximum sentence (which was not the situation in *Harris*). *Harris* has engendered confusion in the lower courts, and appellate courts in five circuits have questioned whether its doctrinal underpinnings have been so eroded by subsequent decisions of this Court that the case may not remain good law.

The split in the circuits on these issues is intractable, as appellate courts on both sides of the divide have recently reaffirmed their positions. Only a decision of this Court can resolve the issues and create nationally binding law for the uniform administration of an important federal statute.

This case presents an ideal vehicle for resolving these issues. The burden of proof in this case truly mattered. In imposing a ten-year sentence, the district court found that "[w]hile the court was able to determine the drug quantity based on a preponderance of the evidence, it does not believe that the evidence would have been sufficient to sustain a decision beyond a reasonable doubt." App. 24a. Equally clear is that Clark would have

received a lower sentence absent the preponderance-level finding of drug quantity. The district court initially sentenced Clark to four years and later re-sentenced him to ten years based on the government's position that the drug quantity finding dictated a sentence within the ten-year-to-life range under § 841(b)(1)(A). App. 2a. There can be no suggestion that any error was harmless here; the record is clear that a finding of drug quantity that the government was unable to prove beyond a reasonable doubt not only exposed Clark to the risk of a life sentence but also increased his sentence from four to ten years.

1. The Charges. The government charged Clark by indictment with conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. § 846, and possession of cocaine with intent to distribute, in violation of § 841(a)(1).[2] App. 23a. The district court had jurisdiction pursuant to 18 U.S.C. § 3231. Clark moved to dismiss the indictment for failure to specify the alleged drug quantities, citing *Apprendi*. C.A. Separate App. 35-37. Upon denial of the motion, Clark entered a blind plea of guilty but did not admit that the offenses involved any specific quantity of cocaine. App. 2a. Clark maintained throughout the proceedings that he had received less than one kilogram of cocaine. App. 2a-3a.

As the Seventh Circuit noted, Clark repeatedly argued to the district court "that the quantity of drugs at

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[2] 21 U.S.C. § 846 provides that anyone who "attempts or conspires" to commit an offense specified by § 841 "shall be subject to the same penalties as those prescribed for the offense," thus adopting the penalty scheme set forth in § 841(b)(1) for conspiracy offenses. See 21 U.S.C. § 846.

issue is an element of his 21 U.S.C § 841 offense, and that the Fifth and Sixth Amendments precluded subjecting him to an enhanced sentence based on a drug quantity that was not determined by a jury beyond a reasonable doubt." App. 2a-3a. Adhering to Seventh Circuit precedent to the contrary, the district court overruled Clark's objections and convened a hearing to determine drug quantity by a preponderance of the evidence. App. 3a.

*2. **The Drug Quantity Hearing.*** The government presented a single witness, co-defendant Juan Corral, a long-time drug dealer and gang member with drug, money laundering, and firearms convictions who admitted that he had lied under oath in the past and agreed that he was a perjurer. C.A. Separate App. 97-99, 109, 114-15, 128-31, 161-62.

Arrested in June 2002, and facing the possibility of lifetime imprisonment, Corral provided the government with purported drug quantity estimates for more than forty of his alleged customers strictly from memory, without any confirmatory books or records. C.A. Separate App. 127-28, 135-37, 159-61.

Corral testified that he met Clark in February 2002 and provided varying amounts of cocaine to him on unspecified occasions until Corral's arrest in June 2002. C.A. Separate App. 118-20, 126-27. Corral admitted that he had no memory of any specific drug transaction with Clark and no recollection of the number of such transactions. C.A. Separate App. 126, 172-73, 180-81.

Nevertheless, Corral estimated that he had provided Clark with a total of "maybe" 17 kilograms of cocaine. C.A. Separate App. 126. The district court noted the weakness of Corral's testimony: "I think he's trying to do his best, but I don't think his best is quite good

enough to send somebody away for." C.A. Separate App. 189; App. 4a.

The government sought to corroborate the testimony of its only witness with an excerpt from a government agent's summary and interpretation of wiretap intercepts contained in a complaint affidavit. App. 4a-6a; C.A. Separate App. 190-92. The summary was not introduced into evidence, but rather used to refresh Corral's recollection about two conversations he supposedly had with Clark on June 5, 2002 regarding "tickets." C.A. Separate App. 122-25, 212-14. Corral did not, however, testify that the transaction supposedly discussed in code that day ever occurred and the government conceded that it had no evidence that any transactions purportedly discussed with Clark in the wiretapped conversations ever actually took place. C.A. Separate App. 192.

Ultimately, however, the district court concluded that "for purposes of this drug quantity hearing, where the standard is a preponderance of the evidence," the court could rely on the uncalled agent's never-introduced interpretive summary of the telephone intercepts as "irrefutable evidence" that Clark "was discussing relatively large deals, that's deals in the five-to-six kilogram range with Mr. Corral on two occasions." C.A. Separate App. 207, 214; App. 4a-6a. Based on the assumption that two transactions totaling eleven kilograms occurred, the court hypothesized that if Clark had engaged in two more deals at three kilograms each, or one more deal at five or six kilograms, "we're over fifteen." C.A. Separate App. 207, 209. "So I think in this case I have to find that the preponderance of the evidence establishes that there was something more than fifteen kilograms involved. And that will be the ruling in Mr. Clark's case." C.A. Separate App. 209.

In a later Order, the district court emphasized that "Corral's testimony was vague and uncertain" and that the court "does not believe that the evidence would have been sufficient to sustain a decision beyond a reasonable doubt." App. 24a.

3. The Sentencing. At sentencing, while again objecting to the determination of drug quantity by a preponderance of the evidence, Clark cited his lack of criminal convictions or arrests for narcotics or weapon offenses, and his long-term gainful employment supporting his wife and two children, in arguing for a downward departure from the United States Sentencing Guidelines. C.A. Separate App. 220 & n.1, 221; App. 7a. The government took the position that no mandatory minimum sentence applied and recommended a sentence "within the applicable Guideline range of 108 to 135 months." C.A. Separate App. 225-26; App. 7a.

Noting that Clark had only "a very minor criminal record" for gambling and was "a family man" with an "intact family" and "huge job stability, which really is quite extraordinary" who "appears to have a good life and a positive life," the court agreed that a sentence below the Guideline range was appropriate. App. 7a; C.A. Separate App. 251, 259-60. The court sentenced Clark to 48 months of imprisonment, a sentence that the court believed reflected the "seriousness of the offense," while giving Clark "an opportunity to resume the positive aspects of his past life when he is released." App. 7a-8a; C.A. Separate App. 260-62.

The following day, the government filed a motion to alter the sentence, pursuant to Fed. R. Crim. P. 35(a), contending that contrary to its prior statement to the court, the ten-year mandatory minimum sentence of 21

U.S.C. § 841(b)(1)(A) applied based on the court's drug quantity finding. App. 8a.

The district court agreed with the government that Seventh Circuit precedent allows facts that trigger mandatory minimum sentences, such as drug quantity, to be found by the judge by a preponderance of the evidence. App. 26a-27a. Observing that the Seventh Circuit "has noted the tension in this area of the law, but has declined to reconcile *Harris* with *Apprendi*, *Blakely*, and *Booker*, as long as *Harris* remains the Supreme Court's last word on the issue," the district court acknowledged that it "must follow the law of this circuit." App. 27a-28a. Accordingly, the court re-sentenced Clark to ten years. App. 28a. As the court explained, "I think that, based on Seventh Circuit precedent, I have no choice but to impose the ten-year mandatory minimum" but "my view is that the sentence is wrong under the Supreme Court line of cases beginning with *Apprendi*, going to *Blakely* and going to *Booker*." C.A. Integrated App. A22-A23. The court "urge[d]" Clark to exercise his right to appeal, "because I don't think this sentence is ultimately going to be held to be correct by the Supreme Court" and predicted that "by the time this case is over this sentence will be vacated." *Id.* at A23-A24. A29.

*4. **The Appeal.*** On appeal, the Seventh Circuit affirmed Clark's sentence. The appellate court rejected Clark's arguments that the Fifth and Sixth Amendments, as interpreted by this Court in *Apprendi* and its progeny, and 21 U.S.C. § 841 as a matter of statutory interpretation, required drug quantity to be proved to a jury beyond a reasonable doubt before Clark could be sentenced for an aggravated offense under 21 U.S.C. § 841(b)(1)(A). App. 15a-18a. The Seventh Circuit adhered to its view that "judges may find facts, by a preponderance of the evidence, that subject a defendant to a

statutory mandatory minimum" and "*Apprendi* has no application" as long as the sentence is "at or below the maximum provided in § 841(b)(1)(C)." App. 16a. The Seventh Circuit also reaffirmed its view that "neither the statute, nor *Apprendi* and its progeny" require that "drug quantity constitutes an element of an § 841 offense that must be proved to a jury beyond a reasonable doubt." App. 17a. The Seventh Circuit acknowledged that "the Second and Ninth Circuits have adopted contrary approaches to drug quantity determinations under § 841," but declined to alter its own position based on the contrary views of those circuits. App. 17a.

REASONS FOR GRANTING THE PETITION

The decision below perpetuates conflicts among the courts of appeals regarding important and frequently recurring issues of federal law that this Court has not directly addressed.

The first issue dividing the circuit courts is whether the Fifth and Sixth Amendment rights recognized by *Apprendi* protect a defendant when the government seeks an enhanced sentence based on judicial fact-finding, or only when the sentence ultimately imposed exceeds the default statutory maximum.

In addressing this question, the Second and Ninth Circuits have focused on this Court's language applying *Apprendi* broadly to protect against "exposure" to higher potential statutory maximums based on facts determined by a court by a preponderance of the evidence. In these two circuits, if a fact empowers a judge to sentence an individual to a higher statutory maximum, that fact must be charged in the indictment and proved beyond a reasonable doubt. As such, in the Second and

Ninth Circuits, *Apprendi* rights attach before sentencing. See *United States v. Gonzalez*, 420 F.3d 111, 129 (2d Cir. 2005) ("[W]e cannot conclude . . . that *Apprendi* and its progeny apply only to prosecutions that actually result in sentences exceeding otherwise applicable maximums. . . . The *Apprendi* rule applies to the resolution of any fact that would substitute an increased sentencing range for the one otherwise applicable to the case."); *United States v. Velasco-Heredia*, 319 F.3d 1080, 1085 (9th Cir. 2003) ("[B]ecause Velasco-Heredia's sentencing range as fixed by the court's verdict was constitutionally restricted to zero to five years pursuant to § 841(b)(1)(D), his exposure to the imposition of from five to forty years amounted to clear *Apprendi* error."). Like the Seventh Circuit in this case, the Second Circuit recently reaffirmed its position. See *United States v. Confredo*, 528 F.3d 143, 153 (2d Cir. 2008) ("Our Court has ruled that *Apprendi* applies not only where an enhanced sentence exceeds the statutory maximum but also where an enhancement exposes the defendant to the risk of a sentence that exceeds the statutory maximum.").

The rule is different in the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits. In these circuits, only if a judicially-found fact actually results in a judge imposing a sentence in excess of the default statutory maximum must that fact have been charged in the indictment and proved beyond a reasonable doubt. See, e.g., *United States v. Robinson*, 241 F.3d 115, 121-22 (1st Cir. 2001) ("[T]he *Apprendi* rule applies only in situations in which a judge-made factual determination actually boosts the defendant's sen-

tence beyond the basic statutory maximum. Theoretical exposure to a higher maximum punishment, in and of itself, is not enough.") (internal citations omitted).[3]

The second issue dividing the circuit courts is whether, as a matter of statutory interpretation, drug quantity is an element of an aggravated offense under §§ 841(b)(1)(A) and -(b)(1)(B). In addressing this question, the circuits are split along the same lines.

In the Second Circuit, "drug quantity is an element that must always be pleaded and proved to a jury or admitted by a defendant to support conviction or sentence on an aggravated offense under § 841(b)(1)(A) or -(b)(1)(B)." *Gonzalez*, 420 F.3d at 131. In the Ninth Circuit, while drug quantity is neither an element nor a sentencing factor, but rather "a material fact," it must still be submitted to the jury and proved beyond a reasonable doubt in a prosecution under §§ 841(b)(1)(A) or -(b)(1)(B). *United States v. Thomas*, 355 F.3d 1191, 1195 (9th Cir. 2004) ("[T]he relevant inquiry is not whether a penalty provision is an element, but rather whether it exposes the defendant to a longer sentence than would be authorized by the jury's guilty verdict.").

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[3] See also *United States v. Vazquez*, 271 F.3d 93, 98 (3d Cir. 2001) (*en banc*); *United States v. General*, 278 F.3d 389, 393 (4th Cir. 2002); *United States v. Keith*, 230 F.3d 784, 786-87 (5th Cir. 2000); *United States v. Copeland*, 321 F.3d 582, 603 (6th Cir. 2002); *United States v. Hernandez*, 330 F.3d 964, 980 (7th Cir. 2003) (*en banc*); *United States v. Aguayo-Delgado*, 220 F.3d 926, 933 (8th Cir. 2000); *United States v. Thompson*, 237 F.3d 1258, 1261-62 (10th Cir. 2001); *United States v. Sanchez*, 269 F.3d 1250, 1276 (11th Cir. 2001) (*en banc*); *United States v. Graham*, 317 F.3d 262, 273-74 (D.C. Cir. 2003).

In the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits, drug quantity is an element only if the defendant receives a sentence greater than the twenty-year statutory maximum of § 841(b)(1)(C). Otherwise, drug quantity is a sentencing factor that may be found by the court by a preponderance of the evidence. See, e.g., *United States v. Stark*, 499 F.3d 72, 80 (1st Cir. 2007) ("[D]rug quantity is not an element of the offense under 21 U.S.C. § 841 unless the amount of drugs is used to increase the defendant's sentence beyond the applicable maximum penalty.").[4]

The third issue dividing the courts of appeals is whether *Harris* authorizes the imposition of a mandatory minimum sentence when facts found by a judge by a preponderance of the evidence not only trigger the mandatory minimum but also expose the defendant to a higher maximum sentence, substituting a new sentencing range. The Second and Ninth Circuits have concluded that *Harris* does not apply in that situation. *Gonzalez*, 420 F.3d at 127 ("*Harris* simply does not speak to th[e] circumstance" where a judicially-found fact author-

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[4] See also *United States v. Vazquez*, 271 F.3d at 98; *United States v. Promise*, 255 F.3d 150, 156-57 (4th Cir. 2001) (*en banc*); *United States v. Doggett*, 230 F.3d 160, 164-65 (5th Cir. 2000); *United States v. Strayhorn*, 250 F.3d 462, 468 (6th Cir. 2001), *overruled in part by United States v. Leachman*, 309 F.3d 377, 383 (6th Cir. 2002); *United States v. Nance*, 236 F.3d 820, 825 (7th Cir. 2001); *United States v. Serrano-Lopez*, 366 F.3d 628, 638 (8th Cir. 2004); *United States v. Jones*, 235 F.3d 1231, 1236 (10th Cir. 2000); *United States v. Clay*, 376 F.3d 1296, 1301 (11th Cir. 2004); *United States v. Lafayette*, 337 F.3d 1043, 1048 (D.C. Cir. 2003).

izes the judge to impose a higher maximum as well as a mandatory minimum); *Velasco-Heredia*, 319 F.3d at 1085 ("The situation in this case contrasts with that in *Harris*, in which the defendant was never *exposed* to a greater maximum sentence.") (emphasis in original). Although the other circuits have not discerned such a limit to the scope of *Harris*, courts and commentators alike have expressed doubts regarding the reasoning and viability of *Harris*. See *infra* at pp. 25-29.

These issues that have divided the circuits are confronted every day in federal court. Moreover, because the circuit courts have come to conflicting conclusions, the questions are resolved differently every day depending on where the district court sits. Thus, the government faces a lower burden of proof as to drug quantity in prosecuting aggravated drug offenses in Chicago than in New York or Los Angeles, and defendants in Chicago, such as Clark, face higher sentences for the same offenses than do defendants in New York and Los Angeles on similar facts under the same federal statute.

The practical effect of this split is easily demonstrated. In this case, while Clark was sentenced in the Seventh Circuit to ten years imprisonment based on a drug quantity finding that the government could not prove beyond a reasonable doubt, in the Second and Ninth Circuits, under the exact same facts, the district court would have been free to sentence Clark to the four-year term that it believed was appropriate and sufficient.

The circuit split is entrenched, as evidenced by the fact that both the Seventh and Second Circuits recently reaffirmed their positions. Only a decision of this Court can resolve the issues and bring about uniformity in the administration of an important federal criminal statute

and consistency in the treatment of defendants at sentencing.

I. Whether *Apprendi* Rights Attach Before Or After Sentencing Should Be Settled By This Court To Resolve A Split Among The Circuits.

In *Jones v. United States*, this Court held that under the Fifth and Sixth Amendments, "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 526 U.S. 227, 243 n.6 (1999). This was not, however, a revolutionary holding: prior cases had "suggest[ed] rather than establish[ed] this principle." *Ibid.*

In *Apprendi v. New Jersey*, the Court expanded on this principle, applying it to the states under the Fourteenth Amendment and holding that "'it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'" 530 U.S. at 490 (quoting *Jones*, 526 U.S. at 252-53).

Since *Apprendi*, this Court has issued a number of opinions to clarify the scope of this constitutional principle.[5] Indeed, this Term the Court granted certiorari to

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[5] See, *Cunningham v. California*, 127 S. Ct. 856, 860 (2007) (reaffirming *Apprendi* as applied to California's Determinate Sentencing Law); *United States v. Booker*, 543 U.S. 220, 243-44 (2005) (reaffirming *Apprendi* as applied to the Federal Sentencing Guidelines); *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) (clarifying that the "statutory maximum" for purposes of *Apprendi* is the maximum

address yet another issue under *Apprendi*. See *Oregon v. Ice*, 128 S. Ct. 1657 (2008) (granting writ of certiorari on the issue of whether *Apprendi* applies to facts required to impose consecutive sentences).

Never directly addressed in any of these cases, however, is when the Fifth and Sixth Amendment rights protected under *Apprendi* attach. This question of timing is an issue of critical constitutional and practical importance.

The view of the Second and Ninth Circuits that *Apprendi* rights attach before sentencing is amply supported by this Court's jurisprudence and, we submit, is the better-reasoned approach. These circuits have focused on this Court's repeated references to "exposure" in holding that a defendant's rights under *Apprendi* are violated when the defendant is faced with the potential of being sentenced to a higher statutory maximum.

In *Gonzalez*, the Second Circuit ruled that the district court erred in applying § 841(b)(1)(A) because the preponderance-level finding of drug quantity exposed the defendant to a higher statutory maximum, notwithstanding that he received a sentence below the maximum available under § 841(b)(1)(C) absent the drug quantity finding. 420 F.3d at 120. Rejecting the argument that *Apprendi* applies "only to prosecutions that actually result in sentences exceeding otherwise appli-

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sentence a judge may impose without additional factual findings); *Ring v. Arizona*, 536 U.S. 584, 588-89 (2002) (applying *Apprendi* to capital-sentencing); *Harris*, 536 U.S. at, 568 (holding that *Apprendi* does not apply to facts only triggering a mandatory minimum); *United State v. Cotton*, 535 U.S. 625, 630-31 (2002) (clarifying that a defective indictment under *Apprendi* does not deprive a federal court of jurisdiction).

cable maximums," the court noted that "various pluralities of the Supreme Court . . . have persisted in using broad language, focusing on the increase in the sentencing range and not just an increase in the actual sentence, to identify facts that are properly treated as elements of aggravated crimes." *Id.* at 128-29.

Similarly, in *Velasco-Heredia*, the Ninth Circuit ruled that the district court erred in applying § 841(b)(1)(B) because the trial court's preponderance-level finding of additional drug quantity (beyond that stipulated to by the defendant) exposed the defendant to a higher statutory maximum, notwithstanding that the sentence imposed was no higher than the maximum available absent the drug quantity finding under § 841(b)(1)(D). 319 F.3d at 1083-86. The Ninth Circuit rejected the government's position that any error was harmless because the actual sentence imposed did not exceed the default statutory maximum because such an argument "put[] the cart before the horse." *Id.* at 1086.

As noted by the Second and Ninth Circuits, this Court has repeatedly used broad language suggesting that *Apprendi* rights attach upon exposure to a higher statutory maximum penalty. See, e.g., *Cunningham*, 127 S. Ct. at 863-64 ("This Court has repeatedly held that, under the Sixth Amendment, any fact that *exposes* a defendant to a greater *potential sentence* must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.") (emphasis added); *Shepard v. United States*, 544 U.S. 13, 24 (2005) ("[A]ny fact other than a prior conviction *sufficient to raise the limit of the possible federal sentence* must be found by a jury, in the absence of any waiver of rights by the defendant.") (emphasis added); *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) ("Put simply, if the existence of any fact (other than a prior conviction)

increases the maximum punishment *that may be imposed* on a defendant, that fact . . . constitutes an element, and must be found by a jury beyond a reasonable doubt.") (emphasis added); *Ring*, 536 U.S. at 613 ("[T]he finding of an aggravating circumstance *exposes* 'the defendant to a greater punishment than that authorized by the jury's guilty verdict.' When a finding has this effect, *Apprendi* makes clear, it cannot be reserved for the judge.") (Kennedy, J., concurring) (internal citation omitted) (emphasis added); *Jones*, 526 U.S. at 252 ("[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the [congressionally] prescribed *range of penalties to which a criminal defendant is exposed.*") (Scalia, J., concurring) (emphasis added); *Id.* at 252-53 ("[F]acts that increase the prescribed *range of penalties to which a criminal defendant is exposed*" must be submitted to a jury and "established by proof beyond a reasonable doubt.") (Stevens, J., concurring) (emphasis added).

In all of these cases, this Court took a pragmatic approach to protecting Fifth and Sixth Amendment rights. The Court's concern was not simply whether a fact resulted in a sentence above the default statutory maximum penalty, but whether the fact increased the "range of penalties" to which the defendant was exposed. As the Court noted in *Blakely*, prior to *Apprendi*:

> [A] defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong.

Blakely, 542 U.S. at 311-12 (citing 21 U.S.C. § 841(b)(1)(A) and -(b)(1)(D)). As this Court warned:

> The jury could not function as a circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish.

Id. at 306-07.

This Court's concern with the practical consequences of erosion of the Fifth and Sixth Amendment rights is justified in this case. The government offered only one witness at the drug quantity hearing and his testimony was, as the district court acknowledged, "vague and uncertain." App. 24a. Much like the situation this Court condemned in *Blakely*, the trial court relied not on facts proved to a jury but on facts "extracted from a report," here the complaint affidavit prepared by a government agent whom the government never called to testify. The district court made it clear it was "assuming the Government has this evidence" "for purposes of this drug quantity hearing, where the standard is a preponderance of the evidence, and I don't think the rules of evidence strictly apply." C.A. Separate App. 212, 214. Yet, the trial court's finding of drug quantity by a preponderance of the evidence at sentencing exposed Clark not only to a ten-year mandatory minimum sentence, where no mandatory minimum would have applied absent that finding, but also increased the maximum penalty Clark faced, from twenty years to life in prison. As the Ninth Circuit observed, it is "too clever by half" to allow the government to wait until the sentencing phase, where the burden of proof is lower (and, we add, where the rules of evidence do not apply) to prove the facts that expose the

defendant to a vastly higher maximum as well as a mandatory minimum sentence. *Velasco-Heredia*, 319 F.3d at 1086.

Moreover, this Court's dedication to protecting the right to a jury trial where the defendant is "exposed" to the risk of a serious sentence long predates *Apprendi* and its progeny. In the seminal case of *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Court held that "the penalty *authorized* for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment." *Id.* at 159 (emphasis added). The defendant had the right to a jury trial because he was charged with a crime *punishable* by up to two years in prison, notwithstanding that he actually received only 60 days in prison. *Id.* at 162 n.35 (rejecting argument that "the critical factor is not the length of the sentence authorized but the length of the penalty actually imposed"). See also *Baldwin v. New York*, 399 U.S. 66, 69 (1970) ("The question in this case is whether the *possibility* of a one-year sentence is enough in itself to require the opportunity for a jury trial. We hold that it is. More specifically, we have concluded that no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is *authorized*.") (emphasis added).

The broad language used in *Apprendi* and its progeny reflects this Court's historic concern with protecting the right to a jury trial where the defendant is exposed to the risk of a serious sentence. Where, as here, a defendant is exposed to the risk of a lifetime behind bars based on a drug quantity finding that the government could not prove beyond a reasonable doubt, the risk to Fifth and Sixth Amendment rights is serious and deserving of this Court's attention.

II. Whether Drug Quantity Is An Element Of The Offense Under §§ 841(b)(1)(A) And -(b)(1)(B) Should Be Settled By This Court To Resolve A Split Among The Circuits.

This Court has yet to address whether drug quantity is an element of the offense under §§ 841(b)(1)(A) and -(b)(1)(B). In the absence of such a definitive ruling, the circuit courts will remain divided, with drug quantity being treated as an element in the Second Circuit, as a material fact requiring proof beyond a reasonable doubt in the Ninth Circuit, and sometimes as an element and sometimes a sentencing factor in the remaining circuits depending on the severity of the sentence imposed. Supreme Court review is warranted in order to ensure nationwide uniformity in the application of this important federal statute.

In holding that drug quantity is an element under § 841(b)(1)(A) and -(b)(1)(B), the Second Circuit has focused on the structure of the statute, noting that each subsection ((b)(1)(A), (b)(1)(B) and (b)(1)(C)) "operates independently of the others" and that "[w]ithin each subsection, the statute provides for each maximum sentence to be linked to a corresponding minimum (except where only a lifetime sentence is mandated)." *Gonzalez*, 420 F.3d at 121. Moreover, "even when Congress identified circumstances warranting identical sentencing ranges regardless of drug quantity . . . it repeated those penalties in each subsection rather than create a generally applicable provision," *ibid.*, indicating Congress's intent that each subsection be treated as an independent offense.

"Nothing in the structure of the statute suggests that the[] corresponding minimums and maximums . . . can be delinked to permit mixing and matching across subsections to create hybrid sentencing ranges not specified by Congress." *Ibid.* Where a defendant is sentenced to the mandatory minimum imposed by §§ 841(b)(1)(A) or -(b)(1)(B), but the drug quantities specified by those statutory sections are not proved beyond a reasonable doubt, the sentence cannot be justified by pointing to the fact that the sentence *could* have been imposed under § 841(b)(1)(C) without proof of drug quantity. Such an argument "distorts the intent of Congress and creates a link where there is not one." *Velasco-Heredia*, 319 F.3d at 1086.

Under § 841, drug quantity *may* be used to impose a sentence above the default statutory maximum for unquantified offenses set by § 841(b)(1)(C). Where such a sentence is in fact imposed, *all* the Circuits agree that drug quantity is an "element" of the offense that must be proved to the jury beyond a reasonable doubt. Thus, "'§ 841(a) no longer presents the *entire* offense; one element of the crime (drug quantity) is to be found in § 841(b).'" *Gonzalez*, 420 F.3d at 124 (citation omitted). But, in the majority of Circuits, drug quantity is a sentencing factor when the sentence imposed is below the default statutory maximum. See *supra* at pp. 12 & n.4. As noted by the Second Circuit, the majority view "cast[s] drug quantity in a dual role" for which there is no support in the statutory structure of § 841. *Gonzalez*, 420 F.3d at 122.

Even within those circuits in the majority, some concurring opinions express reservations about construing § 841 in such a manner. See, e.g., *Vazquez*, 271 F.3d at 113 ("[I]t is possible that Congress intended [drug type and quantity] to be sentencing factors for the judge to

determine. It strains credulity, however, to assert that Congress intended for type and quantity to be treated as sentencing factors in some cases and as elements in others. I know of no statute written in such a manner, nor am I aware of any statutes construed this way.") (Becker, C.J., concurring); *Promise*, 255 F.3d at 185 ("Either facts that affect the sentence a defendant receives are elements or they are not; they are not elements for some purposes and not for others.") (Luttig, J., concurring in the judgment).

The structure of § 841 also mirrors that of the federal carjacking statute (18 U.S.C. § 2119(2)) that this Court interpreted in *Jones,* holding that the "serious bodily injury" provision is an element of the offense. *Jones,* 526 U.S. at 242-43. Like the carjacking statute, § 841(a) appears to list offense elements, followed by the numbered paragraphs of § 841(b) describing penalties. However, this Court rejected such a "superficial impression" in *Jones,* finding that the numbered penalty subsections contained elements of the offense because they "provide for steeply higher penalties" and "condition them on further facts (injury, death) that seem quite as important as the elements in the principal paragraph." *Id.* at 233. Similarly, here, § 841(b) provides for steeply higher penalties based on facts such as drug type and quantity and whether death or serious bodily injury resulted from the offense, that seem "quite as important as the elements" in § 841(a), and thus should be interpreted as elements of the offense. *Id.*

The drug quantity provisions of § 841(b) dramatically alter the penalties to which the defendant is exposed, becoming "a tail which wags the dog of the substantive offense." *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986). For example, a defendant with no prior convictions faces a maximum penalty of five years imprison-

ment for distributing less than 50 kilograms of marijuana (§ 841(b)(1)(D)), but the maximum penalty for distribution of 100 kilograms or more of marijuana is forty years (§ 841(b)(1)(B)(vii)).

This Court has noted that where a particular fact dramatically affects the severity of the sentence, it is appropriate to "assume a [Congressional] preference for traditional jury determination of so important a factual matter." *Castillo v. United States*, 530 U.S. 120, 131 (2000). See also *Jones*, 526 U.S. at 243 (because a finding of "serious bodily injury" increased the authorized penalty by two-thirds under 18 U.S.C. § 2119, that fact was an element of the carjacking statute rather than a sentencing factor). Compare *Harris*, 536 U.S. at 554 (gradual and "incremental" increases in minimum penalties under 18 U.S.C. § 924(c)(1)(A) are "precisely what one would expect to see in provisions meant to identify matters for the sentencing judge's consideration" and "consistent with traditional understandings about how sentencing factors operate").

As this Court warned in *Jones*, leaving the determination of facts that have drastic impact on punishment to a judge—to be decided by the lowest burden of proof—would relegate the jury to a "low-level gatekeeping" function and "merit Sixth Amendment concern." *Jones*, 526 U.S. at 244, 248.

The construction of the statute adopted by the Second Circuit accords with the doctrine of constitutional avoidance:

> [W]here a statute is susceptible to two constructions, by one of which grave and doubtful constitutional questions arise and by the other which such questions are avoided, our duty is to adopt the latter. It is out of respect for Congress, which

> we assume legislates in the light of constitutional limitations, that we adhere to this principle, which has for so long been applied by this Court that it is beyond debate.

Id. at 239-40 (internal quotations and citations omitted). By construing drug quantity as an element for all prosecutions involving aggravated § 841(b)(1)(A) or -(b)(1)(B) offenses, where quantity *may* be used to impose a sentence above the statutory maximum for unquantified drug charges set by § 841(b)(1)(C), the vulnerability to *Apprendi* challenge is removed and the statute is no longer "open to constitutional doubt." *Id.* at 240.

The view of the majority of circuits merits concern for the further practical reason that it creates "intractable problems for parties and the courts." *Gonzalez,* 420 F.3d at 124 n.10.

> If the question of whether drug quantity is an element of an offense depended on the actual sentence imposed (specifically, on whether the sentence was above the otherwise applicable statutory maximum), it would be impossible to know until the final, sentencing phase of the litigation that drug quantity was an element of the crime of conviction that should have been pleaded in the indictment and proved beyond a reasonable doubt to the jury or admitted by the defendant.

Id. Thus, "[e]ven if the right to [jury] trial, as recognized in *Apprendi,* is violated only by certain sentences, the law cannot reasonably defer identification of the elements of a crime until after prosecution is concluded." *Id.* at 115.

III. This Case Presents An Opportunity For The Court To Reconsider The Plurality Opinion In *Harris*.

This Court has recognized that "[its] decisions interpreting the Sixth Amendment are always subject to reconsideration." *Duncan*, 391 U.S. at 158 n.30. This case presents the Court with the opportunity to reconsider the fractured decision in *Harris*.

The majority of circuit courts have based their hybrid treatment of drug quantity—sometimes considered an element and sometimes a sentencing factor—on the plurality opinion in *Harris*, which has been read as holding that *Apprendi* does not apply to facts that trigger a mandatory minimum penalty where the defendant is not sentenced beyond the maximum penalty available absent those facts. See, e.g., *United States v. Jones*, 418 F.3d 726, 732 (7th Cir. 2005) (applying the *Harris* plurality opinion's statement that "judicially found facts used to set minimum sentences are not properly deemed 'elements' of the offense for Sixth Amendment purposes because the jury's verdict authorizes the judge to impose the minimum sentence with or without the judicial fact-finding").

In fact, the majority of the Justices in *Harris* rejected the plurality's statement on which the majority of circuits have so heavily relied. In Section III of the *Harris* plurality opinion, which did not command a majority, Justice Kennedy, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia, 536 U.S. at 549, stated that "a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum)" may be determined by the judge without violating *Apprendi*. *Id.* at 557. But Justice Thomas' dissent, joined

by Justices Stevens, Souter and Ginsburg (all members of the *Apprendi* majority), concluded that "there are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum" because "[w]hether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed." *Id.* at 579 (Thomas, J., dissenting). The dissent explained that "[a]s a matter of common sense, an increased mandatory minimum heightens the loss of liberty and represents the increased stigma society attaches to the offense. Consequently, facts that trigger an increased mandatory minimum sentence warrant constitutional safeguards." *Id.* at 577-78 (Thomas, J., dissenting). Although Justice Breyer concurred in the judgment based on his view that *Apprendi* was wrongly decided, his separate concurring opinion noted an inability to distinguish *Apprendi* from *Harris* "in terms of logic" and disagreed "with the plurality's opinion insofar as it finds such a distinction." *Id.* at 569 (Breyer, J., concurring). Justice O'Connor joined the plurality opinion but wrote a separate concurring opinion to express her belief that *Apprendi* was wrongly decided. *Id.* at 569 (O'Connor, J., concurring). Thus, as the dissent noted, "[t]his leaves only a minority of the Court embracing" the view that *Apprendi* applies to findings that raise the statutory maximum but not those that raise the statutory minimum. *Id.* at 583 (Thomas, J., dissenting).

This Court's decisions following *Harris* have continued to use expansive language applying *Apprendi* where the defendant is "exposed" to a higher potential penalty. See *supra* at pp. 16-17. Moreover appellate courts in five circuits have questioned whether the doctrinal underpinnings of *Harris* have been so eroded by subsequent Supreme Court decisions that *Harris* no longer remains

good law.[6] Obviously, only this Court can resolve those serious questions; the lower courts are bound to follow a Supreme Court decision until this Court itself says otherwise.

The continuing viability of *Harris* has also been questioned by legal commentators,[7] including the

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[6] See *Gonzalez*, 420 F.3d at 126 ("The logic of the distinction drawn in *Harris* between facts that raise only mandatory minimums and those that raise statutory maximums is not easily grasped."); *United States v. Grier*, 475 F.3d 556, 575 (3d Cir. 2006) (Rendell, J., concurring) ("Many, including Justice Breyer in *Harris* itself, have been unable to reconcile *McMillan* and *Harris* with the Supreme Court's holding in *Apprendi*. But 'it is th[e] [Supreme] Court's prerogative alone to overrule . . . its own precedents.'") (internal citations omitted) (alterations in original); *Jones*, 418 F.3d at 732 ("Although there may be some tension between *Booker* and *Harris*, ... to the extent that *Booker* has unsettled *Harris*, it is the Supreme Court's prerogative—not ours—to say so."); *United States v. Dare*, 425 F.3d 634, 641 (9th Cir. 2005) ("We agree that *Harris* is difficult to reconcile with the Supreme Court's recent Sixth Amendment jurisprudence, but *Harris* has not been overruled. We cannot question *Harris'* authority as binding precedent.") (internal citations omitted); *United States v. Barragan-Sanchez*, 165 Fed. Appx. 758, 760 (11th Cir. 2006) ("[W]hile it is possible that *Booker*'s remedial scheme could implicate mandatory minimum sentences in the future, until the Supreme Court holds that mandatory minimums violate the Fifth and Sixth Amendments of the Constitution, we are obliged to continue following *Harris* as precedent. . . . It is not given to us to overrule the decisions of the Supreme Court. . . . This is so even if we are convinced that the Supreme Court will overturn its previous decision the next time it addresses the issue.") (internal quotations omitted).

[7] See, e.g., Andrew Levine, *The Confounding Boundaries of "*Apprendi*-land": Statutory Minimums and the Federal Sentencing Guidelines*, 29 AM. J. CRIM. L. 377, 424 (2002) ("But if the Court is to remain true to the constitutional principles underlying *Apprendi*, it should eventually overrule . . . *Harris* . . . ."); Kevin R.

Chairman of the Committee on Criminal Law of the Judicial Conference, who noted in Congressional testimony that "[m]any observers believe that *Harris* is no longer good law."[8]

Apart from whether *Harris* remains good law, the circuit courts are divided over whether *Harris* applies where the judicially found facts not only trigger a mandatory minimum but also increase the maximum penalty to which the defendant is exposed. In *Harris* the judicially-found facts *only* triggered a mandatory minimum sentence, and had no effect on the maximum penalty (life imprisonment). *Harris*, 536 U.S. at 554 (where a fact "alter[s] only the minimum" sentence, without "authoriz[ing] the judge to impose . . . higher penalties," the Constitution permits the fact to be treated as a sentencing factor). The Second Circuit concluded that *Harris* does not apply to drug quantity findings under § 841 that "raise[] a mandatory minimum sentence [while]. . . simultaneously rais[ing] a corresponding maximum, thereby increasing a defendant's authorized sentencing

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Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1097 & n.54 (2005) ("*Harris* is another sizeable hole in the constitutional Swiss cheese."); Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After* Booker, 2005 U. CHI. LEGAL F. 149, 214-15 (2005) (*Harris* is "in danger" because it creates a "weird asymmetry" allowing judicial fact-finding at the bottom of a guideline range but not at the top.).

[8] *How Judges Are Properly Implementing the Supreme Court's Decision in* United States v. Booker: *Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Sec. of the House Judiciary Comm.*, 109th Cong. 2 (Mar. 16, 2006) (statement of Judge Paul G. Cassell), *available at* http://www.uscourts.gov/testimony/Cassell031606.pdf.

range . . . ." *Gonzalez*, 420 F.3d at 126. The Ninth Circuit came to the same conclusion. *Velasco-Heredia*, 319 F.3d at 1085. As the Second Circuit explained:

> The *Apprendi* rule is, and after *Harris* remains, that 'it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.' It would turn this rule on its head to conclude that a fact, such as drug quantity, which unquestionably increases the 'range of penalties to which a criminal defendant is exposed,' is not an element of the crime that must be pleaded and proved beyond a reasonable doubt (or admitted by the defendant) because it increases the mandatory minimum sentence as well as the maximum. *Harris* simply does not speak to that circumstance.

Gonzalez, 420 F.3d at 126-27 (internal citations omitted) (quoting *Apprendi*, 530 U.S. at 490). The circuits are divided on whether *Harris* applies in such a situation, and there is a need, at a minimum, for the Court to clarify the scope of *Harris*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 2008

Entered August 19, 2008

In the
United States Court of Appeals
For the Seventh Circuit

No. 07-1297

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICKEY CLARK,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 02 CR 1129-**Joan B. Gottschall**, *Judge.*

ARGUED APRIL 15, 2008-
DECIDED AUGUST 19, 2008

Before CUDAHY, KANNE, and SYKES, *Circuit Judges.*

KANNE, *Circuit Judge.* Rickey Clark entered a blind guilty plea with respect to one count of conspiring to possess cocaine with intent to distribute, *see 21 U.S.C. § 846*, and one count of possessing cocaine with intent to distribute, *see id. § 841(a)(1)*. The district court determined by a

preponderance of the evidence that Clark had possessed between 15 and 50 kilograms of cocaine. At the sentencing hearing, the government's attorney repeatedly stated, in error, that Clark was not subject to a mandatory minimum sentence. The judge considered the *18 U.S.C. § 3553(a)* sentencing factors and imposed a sentence of 48 months' imprisonment. The very next day, the government filed a motion to correct the sentence, *see Fed. R. Crim. P. 35(a)*, based on the fact that the court was required to impose a mandatory minimum sentence of ten years due to the quantity of cocaine Clark possessed, *see 21 U.S.C. § 841(b)(1)(A)(ii)*. The court agreed that the mandatory minimum applied, and it amended the judgment to correct the sentence. Because the district court acted within its power under *Federal Rule of Criminal Procedure 35(a)* when it corrected Clark's sentence to reflect the statutory mandatory minimum, we affirm Clark's sentence.

I. HISTORY

Rickey Clark was charged in a multi-count indictment for his participation in a cocaine-distribution conspiracy. Without a written plea agreement from the government, Clark pled guilty to two of the charged counts: conspiring to possess cocaine with intent to distribute, *id. § 846*, and possessing cocaine with intent to distribute, *id. § 841(a)(1)*. Clark did not admit that his offenses involved a particular quantity of cocaine, and he maintained throughout the proceedings that he possessed less than one kilogram. He also argued that the quantity of drugs at issue is an element of

his *21 U.S.C. § 841* offense, and that the *Fifth* and *Sixth Amendments* precluded subjecting him to an enhanced sentence based on a drug quantity that was not determined by a jury beyond a reasonable doubt. At the drug-quantity hearing, the district court pointed out that the Seventh Circuit has rejected similar constitutional arguments, and proceeded to decide the drug quantity by a preponderance-of-the-evidence standard.

The government called Juan Corral as a witness at the drug-quantity hearing. Corral was a cocaine dealer who had spent time in prison for drug-trafficking convictions. Clark was one of Corral's repeat, multiple-kilogram customers between the months of February and June, 2002. During that time period, Corral's sales of cocaine to Clark varied in quantity and frequency. Corral experienced some "droughts," during which Corral's suppliers could not provide him with cocaine. But, Corral explained, Clark was one of his "preferred" customers--whenever Corral came off of a drought, Clark was one of the first customers he would call.

Corral shared how he and Clark would arrange their meetings. They would talk over the phone and arrange a meeting place. They used code words to refer to kilograms of cocaine, including the terms "bench press," "reps," and "tickets." Corral recounted one particular conversation he had with Clark, on June 5, 2002, in which the two men referred to the kilograms of cocaine as "tickets." He said that Clark had asked for five tickets (kilograms), but that he was trying to get Clark to take six. Corral said he

had no doubt in his recollection that on June 5, he and Clark talked about kilograms of cocaine.

In recalling his encounters with Clark, Corral stated that the smallest amount of cocaine he sold Clark on one occasion was three kilograms; the largest amount was around eight kilograms. The amount of cocaine that Clark most frequently purchased from Corral was five to six kilograms. Corral stated that he was "100 percent sure" that when Clark bought cocaine from him, he bought three or more kilograms at a time. Corral recalled, "to the best of [his] knowledge," that he dealt with Clark about once a month. Based on those recollections, Corral estimated that he sold Clark "maybe 17 kilos" of cocaine during the five-month period. Corral thought that he dealt with Clark one time in February, and maybe twice in March. But he could not give estimates for April, May, or June. Corral did not remember the specific dates on which he sold cocaine to Clark. Corral explained how he arrived at the 17-kilogram estimate, which he felt was conservative: "I dealt with him from February 2002 to June 2002. And I [estimated] three keys a month, that would come out to 15. And I know for sure that he purchased at times more than three keys."

When considering the testimony, the district court explained that standing alone, Corral's memory of the sales to Clark was not "good enough to send somebody away for." The court then asked the government how many conversations between Corral and Clark they had recorded--"how many discussions about transactions is the Government

actually able to prove with telephone calls?" The government then referred to the complaint affidavit, which detailed some of the wiretapped conversations. During one such conversation, on May 14, Corral and Clark discussed five kilograms of cocaine. Another set of wiretapped conversations dealt with the June 5 transaction to which Corral testified and addressed five to six kilograms of cocaine. The district court determined that these two phone conversations corroborated Corral's testimony that his drug deals with Clark happened once a month.

The government, however, did not introduce into evidence the actual transcripts or tapes of the wiretapped phone calls. The court instead relied on summaries of the wiretapped conversations contained in a complaint affidavit that was attested to by a drug-trafficking agent in the government's efforts to show probable cause before a magistrate judge. Clark objected to the district court's reliance on the complaint and its affidavit, because "defendants are not included in terms of drafting the complaint, can't cross-examine the drafter of it, can't make any changes, can't make any suggestions. It's the Government's document which they submit."

The district court stated that the summarized wiretapped conversations were "irrefutable evidence that [Clark] was discussing relatively large deals, that's deals in the five-to-six kilogram range with Mr. Corral on two occasions." Those conversations proved to the judge that Corral was "telling the truth in terms of the kind of customer that Mr. Clark was." Even though the tapes were not in evidence, the

district court "assum[ed] the Government ha[d] this evidence that it [was] describing in the complaint." The court explained that the government's summary of the taped conversations was, to some extent, corroborated by Corral. Additionally, the court explained, "This is an official court document. So I'm assuming, for purposes of this drug quantity hearing, where the standard is a preponderance of the evidence, and I don't think rules of evidence strictly apply, that I can rely on the Government's assertion that this complaint is based on surveillance."

Clark also argued that the court should discredit Corral's testimony because Corral was an admitted perjurer who had a deal with the government that was contingent on him testifying to certain things. The district court did not agree, and found that Corral was "trying to be truthful and [ ] trying to be conservative," even though his precision was less than satisfactory. Thus, while Corral's testimony alone was not precise enough, in the district court's view, to justify a 15-kilogram drug-quantity finding, the combination of Corral's testimony with the summarized wiretaps convinced the court that Clark's offense involved more than 15 kilograms of cocaine.

Shortly after the drug-quantity hearing, Clark appeared for sentencing on January 17, 2007. The district court began the sentencing hearing with a question about mandatory minimums: "Is there a mandatory minimum that applies in this case?" The Assistant United States Attorney (AUSA) replied, "There is not, Judge, and the presentence

investigation report is incorrect in regard to that." The AUSA explained that without the mandatory minimum, Clark's sentencing range was 108 to 135 months' imprisonment; his Criminal History Category was I and his offense level was 31. The court repeated its question: "Okay. With no mandatory minimum?" The AUSA replied, "Right."

Clark argued for a sentence below the guidelines range because of his personal characteristics, his steady employment background, and the fact that he had no prior criminal convictions. Clark also argued that he deserved a sentence below the guidelines range because of the weak evidence demonstrating drug quantity. In response, the government urged the district court to sentence Clark within the guidelines range: "the Government would just argue that a guideline range is appropriate here, particularly given that the mandatory minimum does not apply ..."

The district court viewed Clark's cocaine-selling activities as a "significant mistake," but stated that the "rest of his life has been pretty good." The court cited Clark's minor criminal history, his "huge job stability," and the fact that he is a family man, as factors indicating that he is a person who "appears to have a good life and a positive life." The court also took into consideration negative factors--such as Clark's gambling problems and his new conviction for a serious felony drug offense--when analyzing the sentencing factors under *18 U.S.C. § 3553*. The judge decided on a sentence of 48 months, to reflect the "seriousness of the offense," while giving Clark "an

opportunity to resume the positive aspects of his past life when he is released."

The very next day, the government submitted a motion to correct Clark's sentence, pursuant to *Federal Rule of Criminal Procedure 35(a)*. The government acknowledged the mistake it made at sentencing in insisting that no mandatory minimum applied to Clark's offense. The government argued that the district court was required to impose the mandatory minimum prescribed by *21 U.S.C. § 841(b)(1)(A)(ii)*, because of the 15 kilograms attributed to Clark's offense by the court. The district court agreed that the court's drug-quantity finding subjected Clark to the statutory mandatory minimum. The district court explained that, while "the court was able to determine the drug quantity based on a preponderance of the evidence, [the court] does not believe that the evidence would have been sufficient to sustain a decision beyond a reasonable doubt." The court exercised jurisdiction under *Rule 35(a)* and resentenced Clark to ten years in prison.

II. ANALYSIS

On appeal, Clark argues that the district court was not authorized under *Rule 35(a)* to change his sentence. He also argues that his *Fifth* and *Sixth Amendment* rights were violated when the district court found, by a preponderance of the evidence, facts that subjected him to a mandatory minimum sentence of ten years. Finally, he argues that the district court's calculation of the quantity of drugs involved in his offense was clearly erroneous.

A. The district court's correction of Clark's sentence

Clark argues that the district court was not authorized to correct his sentence under *Rule 35(a)* to reflect the statutory mandatory minimum because, in Clark's opinion, the Rule does not allow a correction in a case where the government waived the application of the mandatory minimum at the sentencing hearing. This presents a question of law that we review *de novo*. *See United States v. Mendoza, 510 F.3d 749, 754 (7th Cir. 2007)* (Whether the district court followed the proper procedures after *United States v. Booker* in imposing [a] sentence is a question of law we review *de novo*." (internal citation omitted)).

Rule 35(a) allows for "Correcting Clear Error": "Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." *Fed. R. Crim. P. 35(a)*. The district court's action in this case--correcting the sentence the day after it was imposed--falls within the parameters of *Rule 35(a)*. The error was not arithmetical or technical, but instead was substantive--the court mistakenly failed to apply the mandatory minimum sentence for Clark's conviction, as prescribed by Congress. *See 21 U.S.C. § 841(b)(1)(A)(ii)*.

The scope of *Rule 35(a)* is narrow; the advisory committee notes indicate that the Rule should "extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court . . . ." *Fed. R.*

Crim. P. 35 advisory committee's note to 1991 Amendments. The Rule does not give the district court a second chance to exercise its "discretion with regard to the application of the sentencing guidelines," nor does it allow for changes to a sentence based on the court's change of mind. *Id.* Additionally, the Rule should not be used in a way that relaxes "any requirement that the parties state all objections to a sentence at or before the sentencing hearing." *Id.*

Clark clings to this last limitation on *Rule 35(a)*, and claims that the government lost its opportunity to argue for application of the mandatory minimum sentence by not raising the issue at sentencing, and more significantly, by affirmatively stating that no mandatory minimum sentence applied to Clark's conviction. With this argument, Clark suggests that whenever the government (or the defendant, for that matter) makes a mistake at a sentencing hearing, the court is bound by that mistake and may not correct a sentencing error that stems from it. Clark's position might make sense if applied to discretionary considerations and enhancements or reductions under the advisory guidelines--parties must state all of their objections to the multiple facets of a sentence at the sentencing hearing. *See United States v. Porretta, 116 F.3d 296, 300 (7th Cir. 1997).* Arguing after-the-fact, via a *Rule 35(a)* motion to correct a sentencing error, that the district court improperly applied a sentencing enhancement or reduction "flies in the face of the advisory committee's admonition that it 'did not intend that the rule relax any requirement that the parties state all objections to a sentence at or before the sentencing hearing.'" *Id.*

(quoting *Fed. R. Crim. P. 35* advisory committee's note to 1991 Amendments).

But the situation here is different because the mistake was more fundamental-the resulting sentence violated a legislative mandate requiring that persons convicted of Clark's particular crime, with the amount of drugs involved, be imprisoned for a minimum term of ten years. *See 21 U.S.C. § 841(b)(1)(A)(ii)*. The district court repeatedly asked the AUSA whether there was a mandatory minimum it should factor into Clark's sentence, but the AUSA erroneously stated that there was not. To bind the court to the government's error would not only result in a windfall to this particular defendant--who is not unlike other defendants who were correctly sentenced to the mandatory minimum of ten years' imprisonment--but would also directly contravene congressional intent. Unlike the sentencing guidelines, which are advisory, *see United States v. Booker, 543 U.S. 220, 264-65, (2005)*, statutory mandatory minimums are just as they sound--mandatory, *see United States v. Cannon, 429 F.3d 1158, 1160 (7th Cir. 2005)*. To allow a party's blunder at sentencing to defuse the mandate of Congress--especially where the Federal Rules of Criminal Procedure provide a means for district courts to correct such blunders within seven days of the sentence--would convert individual lawyers into legislators each time a court mistakenly follows an illegitimate recommendation. The statements of the Supreme Court in *Bozza v. United States*, are equally pertinent here: "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the

prisoner. . . . The sentence as corrected, imposes a valid punishment for an offense instead of an invalid punishment for that offense." *330 U.S. 160, 166-167 (1947)* (internal citations omitted).

The mistake in this case that Clark desired to let lie would have been reversed on appeal--district courts must abide by statutory sentencing ranges. *See United States v. Roberson, 474 F.3d 432, 434 (7th Cir. 2007)* ("The Supreme Court's decision in *United States v. Booker*, which made the sentencing guidelines advisory, did not authorize district judges to ignore statutory sentencing ranges. . . . *Booker* confers no authority on judges to disregard statutes." (internal citation omitted)). And the district court was well aware of its authority and the repercussions of such a mistake: "based on Seventh Circuit precedent, I have no choice but to impose the ten-year mandatory minimum, and I think the failure to do so and the propriety of doing so is so clear that it would almost certainly result in a remand, which, I take it, is what I need to find in order to have jurisdiction under *Rule 35* to correct the sentence."

Clark continues, however, that the AUSA's denouncement during the sentencing hearing of a mandatory minimum foreclosed the possibility of a sentence correction under *Rule 35(a)* by way of the waiver doctrine. His argument is somewhat tenable in light of our language in *United States v. Byerley, 46 F.3d 694, 699 (7th Cir. 1995)*. In *Byerley*, the government attorney told the district court that it was within the court's discretion to impose a

mandatory sentence. *Id. at 696*. The government was wrong, but the government did not bring the error to the court's attention until over two years later, after the defendant had (unsuccessfully) appealed his sentence, and after we issued our mandate affirming his conviction. *Id. at 697*. The government filed a motion under the old version of *Rule 35(a)*, which allowed the district court to "correct an illegal sentence at any time and [ ] correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence," that is, within 120 days of an affirmance of the judgment. *Id.* (quoting old *Rule 35(a)*). The government acted within the proper time frame under the old rule, but we decided that the district court could not correct the illegal sentence, notwithstanding the language of old *Rule 35(a)*, because of the government's waiver. *Id. at 699-700.*

> An attorney cannot agree in open court with a judge's proposed course of conduct and then charge the court with error in following that course. [The] AUSA [ ] bound his principal and client, the United States, to the position that the application of the Guidelines and a mandatory minimum sentence to Byerley's conviction was discretionary with the district court. The government cannot now use old *Rule 35(a)* to overcome the errors of its agent.

Id. at 700 (internal citation and quotation marks omitted).

Old *Rule 35(a)* was more expansive than the current version of the rule--allowing for the correction of an illegal sentence "at any time" up to 120 days after an affirmance or dismissal of the appeal. *Id. at 697.* Thus, the Rule allowed for corrections of sentences long after their imposition, and in *Byerley,* the implications of such a broad grant of corrective power were clear. The Rule contemplated allowing a party, the government, to sit back throughout the direct appeal process with the possibility of a *Rule 35(a)* correction in reserve. It made sense for us, in terms of judicial economy and the finality expectations of convicted defendants, to impose a limitation on old *Rule 35(a)* in a case where the government reversed the position it advocated to the district court, years after sentencing.

But that functional limitation is no longer necessary because *Rule 35(a)*'s revision includes a limitation that protects the dual concerns of judicial economy and finality: the district court must correct the sentence within seven days, *see Fed. R. Crim. P. 35(a),* and it may not correct the sentence after that time period, *see United States v. Baldwin, 414 F.3d 791, 797 (7th Cir. 2005)* ("The Supreme Court has held that these rules [including *Rule 35(a)*] operate to deprive the court of authority to act after the time period specified in the rule has elapsed." (citing *Carlisle v. United States, 517 U.S. 416, 428 (1996)) (overruled in part on other grounds by United States v. Parker, 508 F.3d 434, 441 (7th Cir. 2007)).* Unfortunately for Clark, the doctrine of waiver is no longer necessary, nor applicable to the new Rule. Where a party makes a mistake at a sentencing hearing, which in turn leads to the imposition of a

sentence that is clearly wrong--for example, a mistake in contravention of clear congressional intent or mandate--the district court may correct the sentence so long as the correction complies with *Rule 35(a)* and occurs within seven days. We emphasize that such mistakes might be made by either party--if a defendant did not realize at sentencing that he was *not* subject to a mandatory minimum sentence, but the court erroneously applied one, the defendant could make a motion for a corrected sentence within the seven-day time period. We also reiterate that the scope of *Rule 35(a)* is narrow, and our reasoning should not be read to allow parties to raise, after sentencing, arguments for or against enhancements or reductions under the guidelines that should have been raised at the sentencing hearing. *See Porretta, 116 F.3d at 300.* To the extent that this decision is inconsistent with our prior ruling in *Byerley,* we overrule that portion of *Byerley. 46 F.3d at 700.*[1]

B. The imposition of a mandatory minimum sentence based on judge-found facts

Clark contends that the quantity of drugs involved in his offenses should have been determined beyond a reasonable doubt, by a jury. We review this *Apprendi* issue *de novo. United States v. Seymour, 519 F.3d 700, 709 (7th Cir. 2008); see also Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).* Clark was

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[1] This opinion has been circulated among all judges of this court in regular active service pursuant to *Circuit Rule 40(e).* No judge favored a rehearing en banc. Judge Flaum did not participate in the consideration of this case.

convicted under *21 U.S.C. § 841*, which prescribes in its subsections escalating penalties for defendants depending on the quantity of a controlled substance the defendant knowingly or intentionally manufactured, distributed, dispensed, or possessed with intent to manufacture, distribute, or dispense. *21 U.S.C. § 841(a)(1), (b)*; *see also United States v. Hernandez, 330 F.3d 964, 979-80 (7th Cir. 2003)*. Because the amount of cocaine involved in Clark's conviction was over five kilograms, he was subject to a mandatory ten-year term of imprisonment. *21 U.S.C. § 841(b)(1)(A)(ii)*. This mandatory term was below the twenty-year maximum term Clark could have received for a *§ 841* conviction absent any drug-quantity determination. *See id. § 841(b)(1)(C)*.

Clark acknowledges that we have held on multiple occasions that judges may find facts, by a preponderance of the evidence, that subject a defendant to a statutory mandatory minimum. *See United States v. Price, 516 F.3d 597, 605 (7th Cir. 2008)*; *United States v. Jones, 418 F.3d 726, 732 (7th Cir. 2005)*; *United States v. Knight, 342 F.3d 697, 714 (7th Cir. 2003)*; *Hernandez, 330 F.3d at 980-82*; *see also United States v. Collins, 510 F.3d 697, 701 (7th Cir. 2007)*. We see no reason to depart from our precedent and continue to hold that "*Apprendi* has no application where a drug dealer is given a sentence at or below the maximum provided in *§ 841(b)(1)(C)*." *Hernandez, 330 F.3d at 980*; *see also United States v. Abdulahi, 523 F.3d 757, 760 (7th Cir. 2008)* ("*Apprendi* has no application to cases like this one where the sentence is below the statutory maximum.").

One of Clark's arguments on this topic warrants brief consideration. Clark encourages us to rethink our precedent because the Second and Ninth Circuits have adopted contrary approaches to drug-quantity determinations under *§ 841*. In *United States v. Gonzalez, 420 F.3d 111, 133-34 (2nd Cir. 2005)*, the Second Circuit concluded that the "drug quantities specified in *21 U.S.C. § 841* are elements that must be pleaded and proved to a jury or admitted by a defendant to support any conviction on an aggravated drug offense, not simply those resulting in sentences that exceed the maximum otherwise applicable for an identical unquantified drug crime." And in *United States v. Velasco-Heredia, 319 F.3d 1080, 1085-87 (9th Cir. 2003)*, the Ninth Circuit decided that facts subjecting defendants to mandatory minimums under *§ 841* must be proven to a fact-finder beyond a reasonable doubt.

"While we carefully and respectfully consider the opinions of our sister circuits, we are not bound by them." *United States v. Williams, 184 F.3d 666, 671 (7th Cir. 1999)*. "Our duty is to independently decide our own cases, which sometimes results in disagreements with decisions of the other circuits." *Atchison, Topeka & Santa Fe Ry. Co. v. Pena, 44 F.3d 437, 443 (7th Cir. 1994)*. We have carefully analyzed whether drug quantity constitutes an element of an *§ 841* offense that must be proven to a jury beyond a reasonable doubt, and have decided time after time that neither the statute, nor *Apprendi* and its progeny, dictates such a result. *See, e.g., United States v. Martinez, 301 F.3d 860, 863-66*

(7th Cir. 2002); see also Abdulahi, 523 F.3d at 760-61; Hernandez, 330 F.3d at 980-81.

C. The district court's drug-quantity findings

We review the district court's determination of drug quantity for clear error. *United States v. Artley, 489 F.3d 813, 821 (7th Cir. 2007).* "This is a highly deferential standard of review and we refuse to 'second-guess the sentencing judge.'" *United States v. Hankton, 432 F.3d 779, 789 (7th Cir. 2005)* (quoting *United States v. Cleggett, 179 F.3d 1051, 1054 (7th Cir. 1999)).* The government had the burden of proving drug quantity to the court by a preponderance of the evidence, *United States v. McGowan, 478 F.3d 800, 802 (7th Cir. 2007); United States v. White, 360 F.3d 718, 720 (7th Cir. 2004),* but the evidence supporting the drug-quantity determination need not have been limited to evidence admissible at trial. *White, 360 F.3d at 720; United States v. Galbraith, 200 F.3d 1006, 1011-12 (7th Cir. 2000).*

Clark argues that the district court should not have relied on the testimony of Juan Corral because Corral was an admitted perjurer and drug user who had lied previously to protect his own interests. This argument fails because the district court specifically found Corral to be a truthful witness, despite his inability to remember specific details about his deals with Clark. A district court's determination of witness credibility is "entitled to great deference and 'can virtually never be clear error.'" *White, 360 F.3d 718, 720 (7th Cir. 2004)* (quoting *United States v. Blalock, 321 F.3d 686, 690 (7th Cir. 2003)).* Further,

a sentencing court may credit testimony that is "'totally uncorroborated and comes from an admitted liar, convicted felon, or large scale drug-dealing, paid government informant.'" *Id.* (quoting *Blalock, 321 F.3d at 690*); *see also Galbraith, 200 F.3d at 1012*; *United States v. Rodgers, 245 F.3d 961, 968 (7th Cir. 2001)* ("[T]he district judge was free to credit Dexter. That Dexter was a convicted felon who stood to gain from his testimony against Rodgers is by no means a remarkable circumstance."). Furthermore, it is clear from the record that Corral's testimony about his sales to Clark never wavered. He maintained throughout the 17-kilogram estimate, and consistently explained that Clark usually purchased five kilograms, sometimes purchased three, and at least once purchased eight. Unlike the situation in *United States v. Beler, 20 F.3d 1428, 1433-34 (7th Cir. 1994)*, where the witness wavered in his testimony about drug quantity, Corral's testimony remained constant.

To compute his estimate of cocaine sales, Corral multiplied the minimum number of kilograms he sold to Clark during a transaction (three kilograms) by the number of months he dealt with Clark (five months)--15 kilograms. Because he remembered selling Clark more than three kilograms "at times," he added an additional two kilograms to his total calculation of 17 kilograms, which Corral stated was conservative. This method of computation, assuming credibility and reliability of the witness, is permissible. A district court may "calculate drug quantity by taking a witness's estimate of the amount of drugs she usually purchased and multiplying it by the number of times she bought

drugs from the defendant." *White, 360 F.3d at 720*; *see also United States v. Durham, 211 F.3d 437, 444 (7th Cir. 2000)*.

Granted, Corral could not recall the specific details of his deals with Clark, the exact number of occasions he sold cocaine to Clark, or the amount of cocaine involved in each sale. Clark argues that because Corral could not remember details, his testimony lacked the required "indicia of reliability" that would allow the district court to rely on his statements. *See Beler, 20 F.3d at 1433*. Indeed, the district court agreed that Corral's recollections were vague and not specific enough in themselves to support a drug-quantity finding of over 15 kilograms. However, the district court decided that the summaries of the wiretapped phone conversations--contained in the original complaint affidavit that was submitted to a magistrate judge--corroborated Corral's testimony. The two phone calls from May and June corroborated Corral's testimony that Corral dealt with Clark about once per month and that Corral sold Clark kilogram quantities of cocaine.

The transcripts of those conversations were not admitted into evidence, nor were the actual recordings--so Clark objects to the district court's reliance on the complaint affidavit that summarized the conversations. The district court explained that because the standard was only a preponderance of the evidence, and the rules of evidence did not apply, it could rely on the government's assertion in an official court document that the "complaint [was] based on surveillance."

Section 6A1.3(a) of the Guidelines allows sentencing courts to "consider information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." The complaint affidavit was a document presented to a magistrate judge and attested to by the drug trafficking agent. The district court was entitled to credit the complaint as an accurate summary of the government's evidence about Clark. There was nothing suggesting that the complaint was unreliable or that it contained inconsistencies, which was the case in *Beler,* in which two sworn affidavits contradicted one another. *20 F.3d at 1433-36*; *see also Hankton, 432 F.3d at 790* (stating that the defendant did not show how agent's testimony about wiretapped conversations was unreliable, other than the fact that testimony was inadmissible hearsay).

The summaries of the wiretapped conversations supported Corral's testimony, which never wavered with respect to how much cocaine Corral estimated he sold to Clark. We agree with the district court that the complaint affidavit contained the requisite indicia of reliability for the district court to factor its contents into the drug-quantity determination. Between Corral's testimony and the corroborating summaries of the wiretapped conversation, the district court did not clearly err in finding by a preponderance of the evidence that Clark's *§ 841* offense involved more than 15 kilograms of cocaine.

III. CONCLUSION

The amended judgment of the district court correcting Clark's sentence is AFFIRMED.

Entered January 23, 2007

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)
	)
Plaintiff	)
	) Case No.
	) 02 CR 1129
v.	)
	) Judge Joan
	)B. Gottschall
RICKEY CLARK,	)
	)
Defendant.	)

ORDER

The defendant, Rickey Clark ("Clark") was charged with, *inter alia*, conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846 (2006) and possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) (2006). He entered a blind plea of guilty with respect to these counts but did not admit that the offenses involved any specific quantity of cocaine. At the government's request, the court held a hearing on December 7, 2006, to determine the drug quantity. At the hearing, co-defendant Juan Corral ("Corral") testified regarding the amount of cocaine he had supplied to Clark. Based on Corral's testimony, along with transcripts of telephone conversations between Corral and Clark submitted by the

government, the court concluded, by a preponderance of the evidence, that Clark had purchased between fifteen and fifty kilograms of cocaine. While the court was able to determine the drug quantity based on a preponderance of the evidence, it does not believe that the evidence would have been sufficient to sustain a decision beyond a reasonable doubt. Corral's testimony was vague and uncertain, but it was the only testimony on the subject before the court; Clark declined to testify, according to counsel a decision made reluctantly based on a calculus of the risks of testifying when the standard of proof was so low.

On January 17, 2007, Clark appeared for sentencing. The Presentence Investigation Report ("PSR") submitted to the court indicated that Clark's sentencing range under the Federal Sentencing Guidelines ("Guidelines") was between 108 and 135 months. However, the PSR also noted that a mandatory minimum sentence of ten years or 120 months was required, and thus Clark's Guidelines range sentence was 120 to 135 months. Counsel for the government and Clark both mistakenly believed that there was no applicable mandatory minimum sentence, and represented this to the court. Based on the parties' representations, the court sentenced Clark to forty-eight months in prison.

The day after Clark's sentencing, the government submitted a motion to correct Clark's sentence pursuant to Rule 35(a) of the Federal Rules of Criminal Procedure. The government now contends that the court was required to impose a mandatory minimum sentence of at least ten years

pursuant to 21 U.S.C. § 841(b)(1)(A)(ii) based on the amount of cocaine Clark was found to have possessed during the drug quantity hearing.

Rule 35 allows a court, within seven days from the date a sentence is imposed, to "correct a sentence that resulted from arithmetical, technical, or other clear error." Fed. R. Crim P. 35(a). The advisory committee notes to the rule provide that the clear error portion of the rule is to be narrowly construed and applied only when an obvious mistake has occurred that would almost certainly result in a remand. Thus, the question before the court is whether Clark's sentence would almost certainly result in a remand were it appealed.

Clark contends that, as both parties represented at the original sentencing, the mandatory minimum sentence cannot be applied in this case. If it does, Clark contends, the court will violate the rules announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005), since the minimum sentence will be mandated based on facts found by the court applying a preponderance of the evidence standard. In *Apprendi*, the United States Supreme Court held that facts which increase the penalty for a crime beyond the statutory maximum must be found by a jury beyond a reasonable doubt. 530 U.S. at 490. *Blakely* clarified this rule, holding that "the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of facts reflected in the jury verdict or admitted by the defendant*." 542 U.S. at 303. In *Booker*, the

Court affirmed the rule it had announced in *Apprendi* and *Blakely*, but to avoid invalidating the Guidelines on analogous constitutional grounds, ruled that the Guidelines should be read as advisory rather than mandatory. 543 U.S. at 244-45. The question posed by the case at bar is whether a minimum sentence made mandatory by a statute rather than the Guidelines is subject to the constitutional rule of *Apprendi, Blakely* and *Booker*.[1]

The United States Court of Appeals for the Seventh Circuit has held that "judicially found facts used to set minimum sentences are not properly deemed 'elements' of the offense for Sixth Amendment purposes," *United States v. Jones*, 418 F.3d 726, 732 (2005), a rule which it says follows from the Supreme Court's decision in *Harris v. United States*, 536 U.S. 545 (2002). *Harris* held, in the words of the Seventh Circuit, that "minimum sentences based on judicial fact-finding could co-exist with the logical implications of the rule

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[1] It also warrants mention that, on the day of his resentencing, Clark submitted to the court additional authority in support of his position. Specifically, Clark refers the the court to *Cunningham v. California*, No. 05 -6551, 2007 WL 135687 (Jan. 22, 2007), decided by the United States Supreme Court yesterday. In that case, the Court considered the constitutionality of California's determinate sentencing law ("DSL"), which permitted trial judges to determine aggravating facts by a preponderance of the evidence; the judges' fact-finding had the effect of elevating defendants' sentences to a higher range. *Id.* at *4. The Court held that the DSL was unconstitutional under *Apprendi*, *Blakely*, and *Booker*. *Id.* at *14-15. *Cunningham* did not, however, discuss judicial fact-finding related to mandatory minimums or overrule *Harris v. United States*, 536 U.S. 545 (2002), discussed below.

announced in *Apprendi*." *United States v. Duncan*, 413 F.3d 680, 683 (7th Cir. 2005) (citing *Harris*, 536 U.S. at 550, 566-67). In *Duncan*, the Seventh Circuit further noted that nothing in *Booker* suggests the Court intended to overrule *Harris*, and therefore judges must continue to impose mandatory minimum sentences based on judicial fact-finding. *Id.* Moreover, the court said, if the *Harris* rule cannot coexist with *Apprendi* and its progeny, a ruling to that effect must come from the Supreme Court, not from the Seventh Circuit. *Id.* Therefore, the law in this circuit is clear: the judge may find facts which are essential for the imposition of a mandatory minimum sentence using a preponderance of the evidence standard, notwithstanding *Apprendi, Blakely* and *Booker*. *See United States v. Miller*, 450 F.3d 270, 275 (7th Cir. 2006) (noting that *Booker* did not alter court's ability to find facts that have legal consequences except when those facts affect statutory maximum penalties); *United States v. Henry*, 408 F.3d 930, 934 (7th Cir. 2005) (drug quantity is not an element of the offense). *Accord United States v. Malouf*, 466 F.3d 21, 26 (1st Cir. 2006) (holding that drug quantity under section 841 is not an element of the offense, and facts that trigger application of mandatory minimums may thus be found by the judge based on a preponderance of the evidence standard).

The Seventh Circuit has noted the tension in this area of the law, but has declined to attempt to reconcile *Harris* with *Apprendi, Blakely*, and *Booker*, as long as *Harris* remains the Supreme Court's last word on the issue. *See Jones*, 418 F.3d at 732;

Duncan, 413 F.3d at 684-85. This court must follow the law of this circuit, which establishes clearly that drug quantity for purposes of applying the statutory mandatory minimum may constitutionally be found by a judge based on a preponderance standard. The court was obligated to impose the ten year statutory minimum required by 21 U.S.C. § 841(b)(1)(A)(ii) once it found, by a preponderance of the evidence, that Clark possessed between fifteen and fifty kilograms of cocaine. Because a remand for resentencing would almost certainly be the result were the court to leave Clark's current sentence in place, the court has jurisdiction pursuant to Rule 35(a) to resentence Clark to ten years, or 120 months, in prison.

/s/
JOAN B. GOTTSCHALL
United States District Judge

DATED: January 23, 2007

United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Title 21 United States Code (USC)
Controlled Substances Act

Part D -- Offenses and Penalties
Section 841. Prohibited Acts A
Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving --

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of --

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be

sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 845, 845a, or 845b of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. For purposes of this subparagraph, the term "felony drug offense" means an offense that is a felony under any provision of this subchapter or any other Federal law that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances or a felony under any law of a State or a foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances.

Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving --

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of --

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or

for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II , or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed

the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an

individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed --

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use --

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water, shall be fined in accordance with Title 18, or imprisoned not more than five years, or both.

(7) Penalties for distribution.--

(A) In general.--Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18, United States Code (including rape), against an individual, violates subsection (a) by distributing a controlled substance to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18, United States Code.

(B) Definition.--For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

Title 21 United States Code (USC)
Controlled Substances Act

Part D – Offenses and Penalties
Section 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

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(3)

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In the Supreme Court of the United States

RICKEY CLARK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), is violated where a sentencing court finds a fact that, as a statutory matter, exposes a defendant to an enhanced sentence but where the actual sentence imposed does not exceed the maximum sentence that would have been authorized by the jury's verdict or the defendant's admissions alone.

2. Whether drug quantity is an element of the offenses of possessing a controlled substance with the intent to distribute it, in violation of 21 U.S.C. 841, and conspiring to distribute and to possess a controlled substance with the intent to distribute, in violation of 21 U.S.C. 846.

3. Whether this Court's decision in *Harris* v. *United States*, 536 U.S. 545 (2002), should be overruled.

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In the Supreme Court of the United States

No. 08-673

RICKEY CLARK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 538 F.3d 803. The order of the district court (Pet. App. 23a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2008. The petition for a writ of certiorari was filed on November 17, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty to one count of conspiring to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 846, and one count of possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to ten years of

imprisonment, to be followed by five years of supervised release. Pet. C.A. App. SA16-SA18, SA22, SA235-SA238. The court of appeals affirmed. Pet. App. 1a-22a.

1. Juan Corral was a drug dealer who trafficked in multi-kilogram quantities of cocaine. At a hearing held to determine the quantity of drugs involved in petitioner's offenses, Corral estimated that, between September 2001 and June 2002, he purchased more than 250 kilograms of cocaine. Corral sold drugs in quantities that ranged from a few ounces to several kilograms at a time. Repeat customers generally purchased larger quantities. Pet. App. 3a; Pet. C.A. App. SA92, SA97, SA99-SA100, SA102-SA107, SA109-SA110.

Petitioner was one of Corral's repeat, multi-kilogram customers. Between February 2002 and June 2002, Corral sold petitioner approximately 17 kilograms of cocaine, in quantities ranging from three to eight kilograms. Pet. App. 3a-4a; Pet. C.A. App. SA119, SA121, SA126-SA127.

2. a. A grand jury in the Northern District of Illinois returned a multi-count indictment charging petitioner and 11 others with conspiring to distribute and to possess with intent to distribute "in excess of 5 kilograms of mixtures and substances containing cocaine and in excess of 50 grams of mixtures and substances containing cocaine base." Pet. C.A. App. SA16-SA33. Petitioner was also charged with "knowingly and intentionally possess[ing] with intent to distribute a controlled substance, namely mixtures and substances containing cocaine." *Id.* at SA22.

b. Petitioner pleaded guilty to both counts against him without the benefit of a plea agreement. Pet. App. 2a; Pet. C.A. App. SA56-SA84. At the plea hearing, petitioner did not specifically admit that his offenses in-

volved any particular quantity of cocaine. Pet. App. 2a. During the hearing, however, the prosecutor stated that "[t]he mandatory minimum penalty is ten years imprisonment," based on the government's view that petitioner was "accountable for at least 15 kilograms of cocaine." Pet. C.A. App. SA65; see *id.* at SA66; see also 21 U.S.C. 841(b)(1)(A)(ii).

Defense counsel disagreed with the government's drug-quantity estimates, Pet. C.A. App. SA68, and took the position "that, at most, a mandatory minimum of five years is applicable," *id.* at SA67; see *id.* at SA65. Defense counsel also stated, however, that petitioner "kn[ew] that the sentence is driven or caused to a great extent by the amount of narcotics that the Court finds," *id.* at SA67, and did not dispute the court's ability to make findings that would trigger a ten-year mandatory minimum sentence. Petitioner also answered "[y]es" when the district judge asked him if he understood that the court "ha[d] to make these fact findings" and that, "if it turn[ed] out the Government is right," he would be facing a sentence of "between ten years and life." *Id.* at SA71-SA72. The court accepted petitioner's guilty plea. *Id.* at SA81.

c. The district court held a hearing to determine the quantity of drugs attributable to petitioner. Pet. App. 3a-4a. At the conclusion of the hearing, the court found, by a "preponderance of the evidence," that the amount of cocaine attributable to petitioner in the drug conspiracy was "more than fifteen kilograms." Pet. C.A. App. SA209; see Pet. App. 6a.

d. At petitioner's sentencing hearing, the attorney for the government—who was not the same prosecutor who had represented the government at petitioner's plea and drug-quantity hearings—stated that petitioner was

not subject to a mandatory minimum penalty and noted that petitioner had not "plead[ed] to a specific amount that would invoke the mandatory minimum." Pet. C.A. App. SA245; see *id.* at SA244. At the conclusion of the hearing, the district court sentenced petitioner to 48 months of imprisonment, which was 60 months below the bottom end of the advisory Guidelines range of 108 to 136 months of imprisonment. Pet. App. 7a; Pet. C.A. App. SA260-SA261.

e. The next day, the government filed a motion to correct petitioner's sentence in light of the ten-year mandatory minimum that is specified in 21 U.S.C. 841(b)(1)(A)(ii) for any offense involving "5 kilograms or more of" cocaine. See Pet. App. 8a; see also Pet. C.A. App. SA266-SA269; Fed. R. Crim. P. 35(a). The district court granted the government's motion and re-sentenced petitioner to 120 months of imprisonment. Pet. App. 28a. Although the court stated that it did "not believe that the evidence [at the drug-quantity hearing] would have been sufficient to sustain a decision beyond a reasonable doubt," the court reiterated its previous determination, made "by a preponderance of the evidence, that [petitioner] had purchased between fifteen and fifty kilograms of cocaine." *Id.* at 24a.

3. The court of appeals affirmed. Pet. App. 1a-22a. As relevant here, the court reiterated its previous holdings "that judges may find facts, by a preponderance of the evidence, that subject a defendant to a statutory mandatory minimum," and that this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), "has no application where a drug dealer is given a sentence at or below the [20-year] maximum provided in" 21 U.S.C. 841(b)(1)(C). Pet. App. 16a (quoting *United States* v. *Hernandez*, 330 F.3d 964, 980 (7th Cir. 2003), cert. de-

nied, 541 U.S. 904, and 541 U.S. 1040 (2004)). The court of appeals also stated that it had "carefully analyzed whether drug quantity constitutes an element of an *§ 841* offense that must be proven to a jury beyond a reasonable doubt, and ha[d] decided time after time that neither the statute, nor *Apprendi* and its progeny, dictates such a result." *Id.* at 17a. The court of appeals also concluded that "the district court did not clearly err in finding by a preponderance of the evidence that [petitioner's] *§ 841* offense involved more than 15 kilograms of cocaine." *Id.* at 21a.

ARGUMENT

1. Petitioner argues (Pet. 14-20) that the Fifth and Sixth Amendment rights associated with *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), are violated whenever a criminal defendant "is 'exposed' to the *risk of* a" higher sentence as the result of a fact found by a judge applying a preponderance-of-the-evidence standard, regardless of whether the sentence that is ultimately *imposed* is within the maximum that would have been authorized by the jury's verdict or the defendant's admissions alone. Pet. 19 (emphasis added). This Court recently denied a petition for a writ of certiorari that sought review of the same question and relied on the same conflict in lower-court authority that petitioner identifies. See *Butterworth* v. *United States*, 129 S. Ct. 37 (2008) (No. 07-10067); see also *Seymour* v. *United States*, 129 S. Ct. 527 (2008) (No. 07-1608); *Simmons* v. *United States*, 547 U.S. 1022 (2006) (No. 05-7336) (case on collateral review); *O'Neal* v. *United States*, 541 U.S. 960 (2004) (No. 03-7686). There is no reason for a different result here.

a. As the majority of courts of appeals have correctly held, no *Apprendi* error occurs so long as the sentence actually imposed does not exceed the maximum sentence that would have been authorized based on the jury's verdict or the defendant's admissions alone.[1] *Apprendi* holds that, as a matter of constitutional law, "[o]ther than the fact of a prior conviction, any fact that *increases the penalty* for a crime *beyond* the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (emphases added). In *Apprendi* itself, the 12-year sentence imposed by the trial court on the relevant count was two years higher than would have been authorized in the absence of the relevant judge-found fact. See *id.* at 474. The same is true of all of the subsequent decisions in which this Court has found a violation of the Fifth and Sixth Amendment rights recognized in *Apprendi*: in each of those cases, the sentence ultimately imposed exceeded what would have been the legal maximum in the absence of any judge-found facts. See *Cunningham* v. *California*, 549 U.S. 270, 275-276 (2007) (defendant sentenced to 16 years of imprisonment; maximum sentence in the absence of judge-found facts would have been 12 years of imprisonment); *Washington* v. *Recuenco*, 548 U.S. 212, 215 (2006) (39 and 15 months of

[1] See, *e.g.*, *United States* v. *Webb*, 545 F.3d 673, 678 (8th Cir. 2004); *United States* v. *Kelly*, 519 F.3d 355, 363 & n.3 (7th Cir. 2008); *United States* v. *Lizardo*, 445 F.3d 73, 89-90 (1st Cir.), cert. denied, 549 U.S. 1007 (2006); *United States* v. *Serrano-Lopez*, 366 F.3d 628, 638 & n.9 (8th Cir. 2004); *United States* v. *Goodine*, 326 F.3d 26, 27-32 (1st Cir. 2003), cert. denied, 541 U.S. 902 (2004); *United States* v. *Copeland*, 321 F.3d 582, 604-605 (6th Cir. 2003); *United States* v. *Sanchez*, 269 F.3d 1250, 1279 (11th Cir. 2001) (en banc), cert. denied, 535 U.S. 942 (2002); *United States* v. *Williams*, 235 F.3d 858, 863 (3d Cir. 2000), cert. denied, 534 U.S. 818 (2001).

imprisonment, respectively); *United States* v. *Booker*, 543 U.S. 220, 227 (2005) (as to defendant Booker, 360 and 262 months of imprisonment, respectively); *Blakely* v. *Washington*, 542 U.S. 296, 298-300 (2004) (90 and 53 months of imprisonment, respectively); *Ring* v. *Arizona*, 536 U.S. 584, 597 (2002) (death penalty and life imprisonment, respectively); *United States* v. *Cotton*, 535 U.S. 625, 628-629 (2002) (30 and 20 years of imprisonment, respectively).

Petitioner cites (Pet. 14-15, 17) isolated statements from this Court's cases that he asserts establish that "*Apprendi* rights attach upon exposure to a higher statutory maximum penalty." Pet. 17. But the holdings of those cases do not support petitioner's view: none found a constitutional violation in a case where the defendant did not *receive* a sentence that was greater than that authorized by the jury's verdict alone. See pp. 6-7, *supra*; accord *Shepard* v. *United States*, 544 U.S. 13 (2005) (see Pet. 17); *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 111 (2003) (see Pet. 17). And this Court has also repeatedly stated—including in some of the decisions relied upon by petitioner—that the Sixth Amendment inquiry turns on the sentence that is "impose[d]." *Cunningham*, 549 U.S. at 275; see *ibid.* (stating that *Apprendi* establishes that a judge may not "*impose* a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant") (emphasis added); *Booker*, 543 U.S. at 245 (stating that the "Sixth Amendment is violated by the *imposition* of an enhanced sentence under the United States Sentencing Guidelines") (citation omitted; emphasis added); see also *Oregon* v. *Ice*, 129 S. Ct. 711, 716 (2009) (repeating Court's statement in *Apprendi* that the constitutional rule in question applies to "any fact

that *increases the penalty* for a crime beyond the prescribed statutory maximum") (quoting *Apprendi*, 530 U.S. at 490) (emphasis added); *Rita* v. *United States*, 127 S. Ct. 2456, 2466 (2007); see *id.* at 2477 (Scalia, J., concurring in part and concurring in the judgment) ("We have repeatedly affirmed the proposition that judges can find facts that help guide their discretion *within* the sentencing range that is authorized by the facts found by the jury or admitted by the defendant."); *Blakely*, 542 U.S. at 304 (stating that the Sixth Amendment is violated "[w]hen a judge *inflicts* punishment that the jury's verdict alone does not allow") (emphasis added).

Petitioner's sentence of 120 months of imprisonment is less than the 240 months of imprisonment that would have been authorized for an offense involving an unspecified quantity of cocaine. See 21 U.S.C. 841(b)(1)(C). Accordingly, petitioner's Sixth Amendment claim fails.

b. Petitioner cites *United States* v. *Gonzalez*, 420 F.3d 111, 125-127 (2d Cir. 2005), and *United States* v. *Velasco-Heredia*, 319 F.3d 1080 (9th Cir. 2003), as support for his argument that *Apprendi* prohibits any judicial factfinding that authorizes, but does not result in, punishment greater than that which would have been authorized by the defendant's admissions or a jury's verdict alone. Although petitioner is correct that there is a conflict, that conflict does not warrant this Court's review.

Velasco-Heredia was a pre-*Booker* drug distribution case in which the Ninth Circuit held that the district court could not make post-verdict findings on drug quantity using a preponderance of the evidence standard for purposes of triggering a mandatory minimum sentence, because under 21 U.S.C. 841(b)(1)(A) and (B) such

findings also trigger increases in the statutory maximum sentence. 319 F.3d at 1085. Based on the guilt-phase verdict, the defendant was subject to a maximum sentence of five years; if the trier of fact had found the quantity of marijuana that the judge later found at sentencing, the maximum would have been 40 years. Even though the defendant was sentenced only to the mandatory minimum of five years, the Ninth Circuit thought that the judicial factfinding that underlay the mandatory-minimum finding also "*exposed*" the defendant to a higher maximum sentence and thus was a Sixth Amendment violation. *Id.* at 1085-1086.

In *Gonzalez*, the Second Circuit considered whether a district court erred in refusing to permit a defendant to withdraw his guilty plea for conspiring to distribute 50 grams or more of cocaine base when the defendant contested drug quantity during the plea allocution. The court of appeals held that the guilty plea could not be deemed "knowing, voluntary, or sufficient to support a judgment of conviction on a § 841(b)(1)(A) charge," 420 F.3d at 116, because the defendant had not been informed that he had a right to a jury determination of drug quantity and because he failed to admit the element of drug quantity, *ibid.* In so holding, the court reaffirmed its ruling in *United States* v. *Thomas*, 274 F.3d 655 (2d Cir. 2001) (en banc), that drug quantity is an element of a Section 841(a) offense, and it concluded that a defendant's exposure to an enhanced statutory maximum raises *Apprendi* concerns. *Gonzalez*, 420 F.3d at 125-131.

Velasco-Heredia and *Gonzalez* incorrectly applied the constitutional principles set forth in this Court's decisions. As explained above, the Sixth Amendment inquiry turns on the sentence actually imposed, not on

whether the same facts that trigger a mandatory minimum sentence would also, as a statutory matter, authorize a higher maximum sentence. See pp. 6-8, *supra*.

Although the incorrect constitutional analysis contained in *Velasco-Heredia* and *Gonzalez* conflicts with the court of appeals' correct constitutional analysis in this case, further review is not warranted here. First, because petitioner did not seek to withdraw his guilty plea or to challenge the factual basis for his plea, the principal holding of *Gonzalez* is not implicated.

Second, it is far from clear that the exposure-versus-imposition question has significant practical importance. Outside the context of a mandatory minimum sentence, the government is unaware of any case in which the Second Circuit has reversed a sentence for *Apprendi* error on the ground that the sentencing court's finding of drug quantity "exposed" the defendant to an increased maximum sentence when the sentence imposed did not exceed the term of imprisonment supported by the jury's verdict or the defendant's admissions. Cf. *Thomas*, 274 F.3d at 664 ("The constitutional rule of *Apprendi* does not apply where the sentence imposed is not greater than the prescribed statutory maximum for the offense of conviction."). The Ninth Circuit has repeatedly found any such error harmless. See, *e.g.*, *United States* v. *Alvarez*, 358 F.3d 1194, 1212 (stating that defendant's *Apprendi* claim was "wholly without merit" because the defendant was sentenced below the statutory maximum authorized by the jury's verdict"), cert. denied, 543 U.S. 887 (2004). As a result, it appears that the first question upon which petitioner seeks review has little practical importance outside the context of the imposition of mandatory minimum sentences under 21 U.S.C. 841. And, as

discussed in the next sections, see pp. 11-15, *infra*, those issues do not warrant this Court's review at this time.

2. Petitioner also contends (Pet. 20-25) that, as a matter of statutory construction, drug quantity is an element of the offense under 21 U.S.C. 841. This Court has previously denied petitions for writs of certiorari that sought review of that question, including a petition that relied on all but one of the authorities upon which petitioner relies here and that was supported by an amicus brief joined by the same amicus (the National Association of Criminal Defense Lawyers) that urges the Court to grant this petition for a writ of certiorari. See *Goodine* v. *United States*, 541 U.S. 902 (2004) (No. 03-596). Compare Pet. 21-23, with Pet. at 4-11, *Goodine*, *supra* (No. 03-596). Further review is not warranted.

a. Before *Apprendi*, all 12 regional courts of appeals concluded that Congress did not intend for drug quantity to be an element of the offense under Section 841. Relying on the statutory text and structure, legislative history, and other interpretive clues, those courts concluded that Congress intended for drug quantity to be a sentencing factor.[2]

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[2] See, *e.g.*, *United States* v. *Lindia*, 82 F.3d 1154, 1160-1161 (1st Cir. 1996); *United States* v. *Campuzano*, 905 F.2d 677, 679 (2d Cir.), cert. denied, 498 U.S. 947 (1990); *United States* v. *Lewis*, 113 F.3d 487, 490-491 (3d Cir. 1997), cert. denied, 523 U.S. 1108 (1998); *United States* v. *Fletcher*, 74 F.3d 49, 53 (4th Cir.), cert. denied, 519 U.S. 857 (1996); *United States* v. *Morgan*, 835 F.2d 79, 81 (5th Cir. 1987); *United States* v. *Todd*, 920 F.2d 399, 407 (6th Cir. 1990); *United States* v. *Acevedo*, 891 F.2d 607, 611 (7th Cir. 1989); *United States* v. *Wood*, 834 F.2d 1382, 1388 (8th Cir. 1987); *United States* v. *Sotelo-Rivera*, 931 F.2d 1317, 1319 (9th Cir. 1991), cert. denied, 502 U.S. 1100 (1992); *United States* v. *Jenkins*, 866 F.2d 331, 334 (10th Cir. 1989); *United States* v. *Van Hemelryck*, 945 F.2d 1493, 1503 (11th Cir. 1991); *United States* v. *Patrick*, 959 F.2d 991, 995 n.5 (D.C. Cir. 1992).

The Court's decision in *Apprendi* concerns the requirements of the Constitution, not the interpretation of a statute. As the Eleventh Circuit has explained, "*Apprendi* did not announce any new principles of statutory construction," and, consequently, "does not change [pre-*Apprendi*] precedent interpreting [Section] 841." *United States* v. *Sanchez*, 269 F.3d 1250, 1268 (2001) (en banc), cert. denied, 535 U.S. 942 (2002). Rather, *Apprendi* imposes a "constitutional restraint," *ibid.*, that is "external to" the particular statutory scheme under which a prosecution occurs. *United States* v. *Brough*, 243 F.3d 1078, 1079 (7th Cir.), cert. denied, 534 U.S. 889 (2001). Thus, while *Apprendi* now requires that certain facts (such as drug quantity) be found by the jury beyond a reasonable doubt to support an sentence above an otherwise-applicable maximum, that constitutional holding does not alter Congress's intention to make drug quantity a sentencing factor.

This Court has repeatedly emphasized that it makes no difference for *Apprendi* purposes how the legislature structures a statute, what it calls a fact that increases the statutory maximum sentence, or whether it intends for that fact to be treated as an element of the offense. See *Ring*, 536 U.S. at 602 ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt."); see also *Blakely*, 542 U.S. at 303 ("[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"); *Apprendi*, 530 U.S. at 494 ("[T]he relevant inquiry is one not of form, but of effect—does the re-

quired finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?").

The Court has stated that facts that trigger *Apprendi*'s rule, whether or not intended by the legislature to be elements, are the "functional equivalent of" elements when they are used to enhance a sentence, and thus must be subject to the same constitutional requirements when they are so used. *Apprendi*, 530 U.S. at 494 n.19. But that does not mean that such facts must be treated as *statutory* elements. Whether drug quantity is an "element" of a Section 841 offense does not "depend[] on the actual sentence imposed," Pet. 25 (quoting *Gonzalez*, 420 F.3d at 124 n.10), but on whether Congress intended for it to be so. See *Staples* v. *United States*, 511 U.S. 600, 604 (1994) ("[T]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.") (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)).

b. Since *Apprendi*, all but one of the court of appeals that have revisited the issue have reaffirmed their previous conclusion that drug quantity is not an element of the Section 841 offense.[3] In contrast, petitioner is correct that the Second Circuit has held, post-*Apprendi*, that drug quantity is an element of a Section 841(a) of-

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[3] See *Serrano-Lopez*, 366 F.3d at 638; *United States* v. *Toliver*, 351 F.3d 423, 430 (9th Cir. 2003), cert. denied, 541 U.S. 1079 (2004); *Goodine*, 326 F.3d at 31-32; *United States* v. *Smith*, 308 F.3d 726, 740-741 (7th Cir. 2002); *Sanchez*, 269 F.3d at 1268-1269. To the extent that petitioner suggests that the Ninth Circuit's decision in *Velasco-Heredia* should be understood as stating that drug quantity is an element of the offense under 21 U.S.C. 841(a), see Pet. 21-22, the Ninth Circuit's subsequent decisions refute that contention. See *United States* v. *Thomas*, 355 F.3d 1191, 1194 (2004) ("Drug Quantity Is Not an Element Under 21 U.S.C. § 841.") (emphasis omitted); accord *Toliver*, 351 F.3d at 430.

fense. See *Gonzalez*, 420 F.3d at 122-125. That conflict in the circuits, however, has little practical significance and thus does not merit this Court's review.

In light of *Apprendi*'s constitutional holding, the courts of appeals have consistently recognized that, in order to support a sentence in excess of the otherwise-applicable statutory maximum under 21 U.S.C. 841(b), the threshold drug quantities specified in that subsection must be treated as if they are offense elements. That is, in order for an enhanced sentence to be imposed, the threshold drug quantity must be alleged in the indictment and submitted to the jury for determination beyond a reasonable doubt. See, *e.g.*, *United States* v. *Jackson*, 327 F.3d 273, 285 (4th Cir.), cert. denied, 540 U.S. 1019 (2003); *United States* v. *Minore*, 292 F.3d 1109, 1116 (9th Cir. 2002), cert. denied, 537 U.S. 1146 (2003); *United States* v. *Barbosa*, 271 F.3d 438, 457 (3d Cir. 2001), cert. denied, 537 U.S. 1049 (2002). In cases where the government intends to seek an increase in the otherwise applicable statutory maximum sentence, federal prosecutors now routinely assure that the requisite drug quantity levels are charged in the indictment and submitted to the jury for determination beyond a reasonable doubt. Cf. Pet. C.A. App. SA17 (charging that the conspiracy with which petitioner was charged in Count 1 involved "in excess of 5 kilograms of * * * cocaine and in excess of 50 grams of * * * cocaine base"). Similarly, the Department of Justice has advised federal prosecutors that, during plea allocutions, defendants should be required to admit facts that increase the statutory maximum. Cf. *id.* at SA73 (prosecutor stating, without contradiction from defense counsel, that the facts petitioner was required "to admit in order to plead guilty to these two counts of the indictment" included

that he "conspired to knowingly and intentionally conspire to possess with intent to distribute and to distribute controlled substances, namely, in excess of five kilos of mixtures and substances containing cocaine"). Thus, although petitioner himself did not admit to any particular drug quantity at his plea hearing, the question of whether Congress intended for drug quantity to be an element of the offense under Section 841 is ordinarily of little tangible significance in drug prosecutions nationwide. That is confirmed by the rarity with which the issue presented in the petition for a writ of certiorari has arisen.

3. Petitioner contends (Pet. 25-30) that this Court should overrule its constitutional holding in *Harris* v. *United States*, 536 U.S. 545 (2002), that the Fifth and Sixth Amendment rights recognized in *Apprendi* do not apply to judge-found facts that are used solely to increase a defendant's minimum sentence. The Court has repeatedly denied petitions for writs of certiorari that asked it to overrule *Harris* or to declare that its more recent *Apprendi* decisions have already done so implicitly. See, *e.g.*, *Tidwell* v. *United States*, 129 S. Ct. 762 (2008) (No. 07-11458); *Butterworth*, *supra* (No. 07-10067); *Barnes* v. *United States*, 128 S. Ct. 647 (2007) (No. 06-12085); *Speller* v. *United States*, 127 S. Ct. 3005 (2007) (No. 06-10260); *Malouf* v. *United States*, 549 U.S. 1305 (2007) (No. 06-1154); *Roberson* v. *United States*, 549 U.S. 1214 (2007) (No. 06-7738); *Landers* v. *United States*, 547 U.S. 1099 (2006) (No. 05-8774). There is no reason for a different result here.

In *Harris*, this Court held that the constitutional rule announced in *Apprendi* does not preclude the use of facts found by a judge at sentencing to increase a defendant's mandatory minimum sentence. See 536 U.S. at

565, 567-568 (plurality opinion); *id.* at 569, 572 (Breyer, J., concurring in part and concurring in the judgment). As the plurality in *Harris* explained, the *Apprendi* rule rests on the Court's determination that use of a judge's factual findings to increase a defendant's sentence beyond the otherwise-applicable statutory maximum would contravene the "prevailing historical practice" that formed the backdrop for the Fifth and Sixth Amendments. *Id.* at 563. The *Harris* plurality further explained that "[t]here [i]s no comparable historical practice of submitting facts increasing the mandatory minimum to the jury, so the *Apprendi* rule d[oes] not extend to those facts." *Ibid.* The Fifth and Sixth Amendments "ensure that the defendant 'will never get *more* punishment than he bargained for when he did the crime,' but they do not promise that he will receive 'anything less' than that." *Id.* at 566 (plurality opinion) (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)).

This Court's subsequent decisions have not disturbed the Court's constitutional ruling in *Harris*. In *Blakely*, for example, this Court extended *Apprendi* to invalidate a sentencing enhancement based on judge-found facts that "involved a sentence greater than what state law authorized on the basis of the verdict alone." 542 U.S. at 305. The Court distinguished *Harris* on the ground that it "involved a sentencing scheme that imposed a statutory *minimum* if a judge found a particular fact." *Id.* at 304; see *Ring*, 536 U.S. at 604 n.5 (noting the Court's conclusion in *Harris* that "the distinction between elements and sentencing factors continues to be meaningful as to facts increasing the minimum sentence"). That distinction holds true today. See *Kimbrough* v. *United States*, 128 S. Ct. 558, 573 (2007) (stating that "sentencing courts remain bound by the mandatory minimum

sentences prescribed in" 21 U.S.C. 841(b)(1)); *Rita*, 127 S. Ct. at 2477-2478 n.2 (Scalia, J., concurring in part and concurring in the judgment) (recognizing that "eliminating discretion to impose *low* sentences is the equivalent of judicially creating mandatory minimums, which are not a concern of the Sixth Amendment" and citing *Harris*).[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioner also asserts that this Court's review is needed in order "to clarify the scope of *Harris*" because "the circuit courts are divided over whether *Harris* applies where the judicially found facts not only trigger a mandatory minimum but also increase the maximum penalty to which the defendant is exposed." Pet. 29-30. That argument is simply a reprise of petitioner's earlier claims that this Court's holding in *Apprendi* applies to any factual determination that would, as a statutory matter, authorize an increase in the maximum penalty and that Congress intended for drug quantity to be an element of the offense under Section 841. In fact, the two court of appeals decisions upon which petitioner relies in this section of the petition for a writ of certiorari (the Second Circuit's decision in *Gonzalez* and the Ninth Circuit's decision in *Velasco-Heredia*) are the same two decisions upon which he relies with respect to the first two questions presented as well.

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In the Supreme Court of the United States

RICKEY CLARK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

The government's Opposition is more notable for what it does not argue than for what it does. The government does not dispute that the circuit courts are divided on the issues raised in the petition or that the circuit split is mature and intractable. Nor does the government argue that this case is an inappropriate vehicle to resolve the circuit split. Instead, the government devotes much of its brief to addressing the merits of the case. Of course, the appropriate time to argue the merits is not now but after this Court grants review. The government devotes the remainder of its brief to erroneous arguments that the acknowledged circuit split lacks "practical importance." Ironically, the government's own arguments unwittingly underscore the profound practical importance of the circuit split.

As the National Association of Criminal Defense Lawyers ("NACDL") demonstrated in its *amicus* brief, drug crime prosecutions dominate the criminal justice system. NACDL *Amicus* Br. at 13-14. Absent this Court's guidance, the circuit courts will continue to disagree as to the burden of proof when a drug quantity finding increases the sentencing range. Unless this Court acts, similarly situated defendants will continue to face vastly disparate sentences based on nothing more than geography. Just as importantly, the circuit courts will continue to be divided over the broader but related question of whether *Apprendi* applies when a defendant is exposed to a higher sentencing range based on judicial fact-finding. The lower courts will also remain divided over how broadly this Court's fractured plurality decision in *Harris* should be interpreted and will continue to question whether *Harris* remains good law.

The government offers no principled reason why this Court should not resolve these important issues. With ten of the twelve circuits adopting the position it favors, it appears that the government would simply prefer to maintain the status quo rather than chance a review on the merits.

I. The Court's Denial Of Prior Petitions Does Not Refute The Need For Review In This Case.

As a threshold matter, the government argues repeatedly that this Petition should be denied because the Court has previously denied petitions purportedly raising the "same question[s]" in the past. Opp. at 5, 11, 15. This argument is meritless.

Petitions cited by the government did not "directly implicate any circuit conflict." Brief of the United States in Opposition to Petition, at 5, *Butterworth* v. *United States*, No. 07-10067 (June 6, 2008); see also Brief of the United States in Opposition to Petition, at 11, *Tidwell* v. *United States*, No. 07-11458 (Nov. 14, 2008). The government has acknowledged that this case presents a clear circuit split. Opp. at 8, 14.

Nor did petitions cited by the government present the "same question" raised here. See, e.g., Brief of Petitioner, at 20-24, *Landers* v. *United States*, No. 05-8774 (Jan. 20, 2006) (seeking review of mandatory minimums in the context of use of prior felony convictions to increase defendant's sentence).

Petitions cited by the government were filed *pro se*. See Brief of Petitioner, *Tidwell*, supra (June 11, 2008); Brief of Petitioner, *Simmons* v. *United States*, No. 05-7336 (Oct. 24, 2005); Brief of Petitioner, *O'Neal* v. *United States*, No. 03-7686 (June 30, 2003).

Petitions cited by the government also predated the seminal decisions in *United States* v. *Booker*, 543 U.S. 220 (2005) and *Blakely* v. *Washington*, 542 U.S. 296 (2004). See Brief of Petitioner, *Goodine* v. *United States*, No. 03-596 (Oct. 16, 2003).

Moreover, this Court has previously denied petitions on *Apprendi*-related issues, only to grant later petitions on those same issues. Compare *Buchanan* v. *Washington*, 537 U.S. 1198 (2003) (denying petition), with *Blakely* v. *Washington*, 540 U.S. 965 (2003) (granting petition characterized in State of Washington's opposition as presenting "the identical issue and argument" presented in *Buchanan*).

In short, this Court's denial of the petitions cited by the government does not refute the need for review in this case.

II. This Court Has Not Limited *Apprendi*'s Application To Cases Where The Sentence Imposed Exceeds The Default Statutory Maximum.

The government argues that because this Court's decisions applying *Apprendi* presented factual circumstances where the sentence imposed exceeded the default statutory maximum, it necessarily follows that *Apprendi* protections apply *only* when the sentence exceeds the default statutory maximum. Opp. at 6-8. The government's limited reading of *Apprendi* is incorrect and, in any case, is a merits-based argument that fails to address whether certiorari is warranted to resolve the circuit split.

Here, a factual finding that the trial court concluded satisfied the preponderance standard, but not the reasonable doubt standard, subjected Clark to a heightened

sentencing range (10 years to life rather than 0 to 20 years) and thereby required the court to sentence Clark to 10 years rather than the court's preferred sentence of 4 years. See Pet. at 7-8. The government cannot point to any decision by this Court holding that no *Apprendi* violation occurred because Clark was only exposed, but not actually sentenced, to a term that exceeded the 20-year default statutory maximum.

Clark has cited language from several of this Court's decisions stating that exposure to an increased sentencing range is sufficient to trigger *Apprendi* rights. Pet. at 16-17. One of this Court's more recent pronouncements is directly on point:

> This Court has repeatedly held that, under the Sixth Amendment, any fact that *exposes* a defendant to a *greater potential sentence* must be found by a jury, not by a judge, and established beyond a reasonable doubt, not merely by a preponderance of evidence.

Cunningham v. *California*, 549 U.S. 270, 281 (2007) (emphasis added).

This language, and the reading of *Apprendi* urged in the Petition, are entirely consistent with this Court's holding in *Duncan* v. *Louisiana*, 391 U.S. 145, 159 (1968) that the defendant's Sixth Amendment right to a jury trial was violated where he was *exposed*, but not *actually sentenced*, to two years imprisonment. Pet. at 19. The government fails even to acknowledge this Court's ruling in *Duncan*.

Rather, the government points to isolated language in support of its narrow view of *Apprendi*. The circuits in the majority rely heavily on a single quotation from *Apprendi* where this Court stated, "[w]e do not overrule *McMillan*. We limit its holding to cases that do not in-

volve *the imposition* of a sentence more severe than the statutory maximum for the offense established by the jury's verdict." *Apprendi* v. *New Jersey*, 530 U.S. 466, 487 n.13 (2000) (emphasis added). See, e.g., *United States* v. *Hernandez*, 330 F.3d 964, 980 (7th Cir. 2003) (*en banc*); *United States* v. *Sanchez*, 269 F.3d 1250, 1262-63 (11th Cir. 2001) (*en banc*); *United States* v. *Aguayo-Delgado*, 220 F.3d 926, 932 (8th Cir. 2000); *United States* v. *Keith*, 230 F.3d 784, 787 (5th Cir. 2000).

Indeed, prior to its decision in *United States* v. *Gonzalez*, 420 F.3d 111 (2d Cir. 2005), even the Second Circuit relied on this language from *Apprendi* to conclude that *Apprendi*'s "prohibition is limited to those sentences actually imposed in excess of otherwise applicable maximums." *United States* v. *Luciano*, 311 F.3d 146, 151 (2d Cir. 2002). The Second Circuit, however, subsequently rejected this narrow view of *Apprendi*, stating that "developments in *Apprendi* jurisprudence suggest that the rule in that case may well reach more broadly than courts had originally understood." *Gonzalez*, 420 F.3d at 128.

Far from undercutting Clark's arguments, the language cited by the government underscores why the Petition should be granted. Circuit courts on each side of the split rely on language from this Court in support of their positions. Only this Court can resolve the confusion among the circuits.

III. The Circuit Split Is Significant.

The government's argument that the split among the circuits lacks "significant practical importance" is unavailing. See Opp. at 10, 13, 14. None of the government's contentions withstands scrutiny.

1. The government argues that the circuit split "has little practical importance outside the context of the imposition of mandatory minimum sentences under 21 U.S.C. 841." Opp. at 10. Even if that were true (which it is not), the government's acknowledgment that the split is important in the context of drug prosecutions involving mandatory minimums demonstrates that this case is worthy of Supreme Court review. As pointed out by the NACDL, drug cases comprise an enormous portion of the federal criminal docket. NACDL *Amicus* Br. at 13. The two circuits in the minority have jurisdiction over approximately one-quarter of this country's population. See U.S. Census Bureau, State & County QuickFacts, http://quickfacts.census.gov/qfd/ (last visited Mar. 3, 2009). Moreover, given the overwhelming prevalence of mandatory minimum sentences in federal drug cases, see NACDL *Amicus* Br. at 14 (noting that 70 percent of drug convictions result in mandatory minimums), the government's concession that the split has practical importance in those cases unwittingly proves the profound practical significance of this circuit split.

2. The government's argument that the split is not significant because "federal prosecutors now routinely assure that the requisite drug quantity levels are charged in the indictment and submitted to the jury," Opp. at 14, is belied by the facts of this case. Apart from the government's failure to cite any authority for its broad assertion of what prosecutors "routinely" do, the government did not charge Clark with a specific quantity of drugs, nor did it prove drug quantity beyond a

reasonable doubt.[1] Moreover, whatever guidance the Department of Justice may have issued to its prosecutors to ensure that certain facts that may trigger a higher sentence are included in an indictment, such guidance is not always followed. See, e.g., *Garcia-Aguilar* v. *United States Dist. Court*, 535 F.3d 1021, 1024 (9th Cir. 2008) ("The problem here arises from the fact that the U.S. Attorney failed to allege in defendants' original indictments that they were previously removed from the country after being convicted of a felony.").

3. The government seeks to minimize the circuit split by arguing that drug quantity is not a statutory element of the offense in the Ninth Circuit. Opp. at 13 & n.3. The government elevates form over substance. As discussed in the Petition, the Ninth Circuit treats drug quantity as the functional equivalent of an element that must be submitted to the jury and proved beyond a reasonable doubt. Pet. at 20; see also *United States* v. *Thomas*, 355 F.3d 1191, 1194 (9th Cir. 2004)("[D]rug type and quantity are not elements of the offense, *but rather are material facts that must be submitted to the jury and proved beyond a reasonable doubt*. . . . [T]he relevant inquiry is not whether a penalty provision is an element, but rather whether it exposes the defendant to a

---

[1] The government's Opposition is misleading in asserting that the prosecution alleged drug quantity in the indictment. Opp. at 14-15. While the government charged a minimum drug quantity for the entire alleged conspiracy in the joint indictment, the indictment failed to charge any drug quantity attributable to Clark. C.A. Separate App. 16-33. Moreover, Clark repeatedly objected to the government's failure to include drug quantity in his indictment or to submit the issue to a jury under the reasonable doubt burden. Pet. at 4-5, 7.

longer sentence than would be authorized by the jury's guilty verdict . . . .") (emphasis added). The government relies on a subheading from *Thomas*, evidently without considering the text beneath it. Compare Opp. at 13 n.3, with *Thomas*, 355 F.3d at 1194 ("Drug Quantity Is Not an Element Under 21 U.S.C. § 841.").

4. The government also attempts to minimize the circuit split by suggesting that the Second Circuit's decision in *Gonzalez* is inapplicable here because Clark "did not seek to withdraw his guilty plea." Opp. at 10. Nothing in *Gonzalez*, however, supports the limitation that the government seeks to impose. See *Gonzalez*, 420 F.3d at 129 ("The *Apprendi* rule applies to the resolution of any fact that would substitute an increased sentencing range for the one otherwise applicable to the case. Because mandatory minimums operate in tandem with increased maximums in § 841(b)(1)(A) and -(b)(1)(B) to create sentencing ranges that 'raise the limit of the possible federal sentence,' drug quantity must be deemed an element for all purposes relevant to the application of these increased ranges."). Nor does the Second Circuit view *Gonzalez* as supporting such a limitation. See *United States* v. *Confredo*, 528 F.3d 143, 153 (2d Cir. 2008) ("[O]ur Court has ruled that *Apprendi* applies not only where an enhanced sentence exceeds the statutory maximum but also where an enhancement exposes the defendant to the risk of a sentence that exceeds the statutory maximum." (citing *Gonzalez*)).

5. The government seeks to downplay the circuit split regarding the interpretation of 21 U.S.C. § 841 by arguing that, prior to *Apprendi*, all twelve circuits "concluded that Congress did not intend for drug quantity to be an element of the offense," and that *Apprendi* "did not alter Congress's intention . . . ." Opp. at 11-12. The government's assertion that the circuit courts were once

in accord is both correct and irrelevant: Regardless of the *past* uniformity of the circuits, there is a split in the circuits *now* that only this Court can resolve.

Under *Apprendi* and its progeny, "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 490. Faced with the argument that the Constitution bars treatment of drug quantity as a mere sentencing factor when the defendant is charged with a quantity-based aggravated offense under 21 U.S.C. § 841(b)(1)(A) or -(b)(1)(B) and thereby exposed to an elevated sentencing range, the Second and Ninth Circuits have relied on the doctrine of constitutional avoidance, as well as statutory language, structure, and Congressional intent, in holding that drug quantity must be construed as an element or the functional equivalent of an element. Pet. at 23-24. The circuits are now plainly divided, and only this Court can resolve the circuit split.

6. The government argues that the Ninth Circuit has found *Apprendi* error to be harmless. Opp. at 10. The case cited by the government, *United States* v. *Alvarez*, 358 F.3d 1194, 1212 (9th Cir. 2004), was decided prior to this Court's rulings in *Blakely* and *Booker*. *United States* v. *Zerr*, 171 Fed. Appx. 654, 654 (9th Cir. 2006) (*Alvarez* was decided when *Apprendi* "did not apply to Guidelines calculations made within the statutory maximum."). Prior to *Booker* and *Blakely*, the rule in every circuit was that once the jury had determined guilt, the judge could increase the sentence under the Sentencing Guidelines based on factors determined by a preponderance of the evidence so long as that sentence did not exceed the statutory maximum. *Schardt* v. *Payne*, 414 F.3d 1025, 1035 (9th Cir. 2005) (citing cases). *Blakely* and *Booker*, however, ended this practice. See

Blakely, 542 U.S. at 304 (rejecting the State of Washington's argument that a sentence above the standard range under the Sentencing Guidelines, but below the statutory maximum for the offense, was not an *Apprendi* violation). *Alvarez* embodied the law as it was before *Booker* and *Blakely*, and is no longer good law.

Tellingly, the government does not and cannot argue that the error in this case was harmless. As made plain by the District Judge, Clark's sentence was increased from four years to ten years *only* because drug quantity was subject to proof by a preponderance of the evidence rather than beyond a reasonable doubt. Pet. at 7-8.

IV. The Government Fails To Address Clark's Arguments That Review Of *Harris* Is Warranted.

The government argues that this Court should not reconsider *Harris* v. *United States*, 536 U.S. 545 (2002) because the Court has denied past petitions asking this Court to review *Harris*. As noted above, this argument lacks merit. Section I, supra, pp. 2-3.

Notably, the government does not contest that the circuit courts disagree as to the scope of *Harris* (Pet. at 28-29) nor that at least five circuit courts, three of whom have adopted the position *favored* by the government, explicitly question the ongoing validity of *Harris*. Pet. at 27 n.6. The government also offers no response to the litany of scholars who view *Harris* as an anomaly ripe for review. Pet. at 27-28 n.7; NACDL *Amicus* Br. at 12.

Instead, the government simply argues that this Court's subsequent decisions have not yet "disturbed" the ruling in *Harris*. Opp. at 16. The government's argument for not reconsidering *Harris* is simply that the

Court has not yet reconsidered *Harris*. Plainly, that is not good enough.

Five of the Justices in *Harris rejected* the plurality's reasoning in holding that *Apprendi* does not apply to facts triggering a mandatory minimum. The four dissenting Justices emphatically concluded that "the principles upon which [*Apprendi*] relied apply with equal force to those facts that expose the defendant to a higher mandatory minimum" as well as an increased statutory maximum because "[w]hether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed." *Harris*, 536 U.S. at 579 (Thomas, J., dissenting). Justice Breyer joined in the Court's judgment only because he adhered to his underlying disagreement with *Apprendi*, but he disagreed with the plurality's attempt to distinguish *Apprendi* "from this case in terms of logic." *Harris*, 536 U.S. at 569 (Breyer, J., concurring in part and concurring in the judgment). Thus, the *majority* of the Court believed that the rationale of *Apprendi* applies equally to facts that subject the defendant to a mandatory minimum as well as to facts that expose the defendant to a higher maximum. Since *Harris*, this Court has continued to apply *Apprendi* broadly to "all the facts 'which the law makes essential to the punishment . . . .'" *Blakely*, 542 U.S. at 304. Six years of developing case law and a growing chorus of critical commentary suggests that the time has come to reconsider *Harris*.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

RICKEY CLARK,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with a national membership of over 11,500 attorneys and more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL seeks to foster the integrity, independence, and expertise of the criminal defense profession; to promote the fair administration of criminal justice; and to sustain the sanctity of the American system of justice through adherence to the Bill of Rights.

In pursuit of those ends, NACDL actively participates in cases addressing the constitutional implications of criminal punishment. NACDL served as *amicus curiae* in the watershed *Apprendi* case, as well as several follow-on matters. See, *e.g.*, *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000) (brief filed Jan. 13, 2000); *Harris* v. *United States*, 536 U.S. 545 (2002) (brief filed Jan. 23, 2002); *Cunningham* v.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. All parties have consented to the filing of this brief.

California, 549 U.S. 270 (2007) (brief filed May 8, 2006). It frequently appears as *amicus curiae* on a variety of issues related to sentencing under Section 841 and other statutes. See, *e.g.*, *Burgess* v. *United States*, 128 S. Ct. 1572 (2008) (brief filed Jan. 29, 2008); *Greenlaw* v. *United States*, 128 S. Ct. 2559 (2008) (brief filed Feb. 21, 2008). Its views have repeatedly informed members of the Court. See, *e.g.*, *Kennedy* v. *Louisiana*, 128 S. Ct. 2641, 2663 (2008) (citing NACDL brief); *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 344 n.3 (2006) (same).

Rickey Clark's petition raises several critical issues that have produced considerable confusion in the lower courts. NACDL believes the Court should grant the petition and resolve these quandaries in order to ensure that criminal defendants are treated fairly and uniformly regardless of the circuit in which they face prosecution. The status quo, which lacks fairness, uniformity, or clarity, should not remain.

INTRODUCTION AND SUMMARY OF ARGUMENT

Clark's petition raises timely and important issues at the intersection of the Controlled Substances Act (21 U.S.C. § 841) and *Apprendi*.

Section 841 is a key vehicle for narcotics prosecutions. It prohibits the manufacture and distribution of controlled substances (§ 841(a)) and establishes escalating punishment ranges for violations of the statute (§ 841(b)). In part, Section 841 describes an "aggravated crime": it defines a substantive prohibition "and then provides for increasing the punishment of that crime upon a finding of some aggravat-

ing fact." *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring).

One such aggravating fact under Section 841 is drug quantity; indeed, "[t]he drug quantity determination is critical to the statutory sentencing provisions in 21 U.S.C. § 841." *United States* v. *Doggett*, 230 F.3d 160, 164 (5th Cir. 2000). The statute describes sentencing ranges that fall into three categories. Subsection (b)(1)(A), applicable to the highest quantities, imposes the most severe sentences, while subsection (b)(1)(B) establishes lower ranges for lesser quantities. Subsection (b)(1)(C) provides ranges for undetermined amounts; if the government does not prove quantity, (b)(1)(C) is the default. Some categories feature floors and ceilings; a quantity triggering (b)(1)(A), for instance, mandates (at least) a 10-year minimum, with no maximum, while an indeterminate quantity caps the maximum sentence at 20 years, with no minimum.

These mandatory minimums and statutory maximums implicate the *Apprendi* doctrine. *Apprendi* established that it is "'unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'" 530 U.S. at 489. Thus, "any fact that exposes a defendant to a greater potential sentence" must be pleaded in the indictment, presented to the jury, not a judge, and established beyond a reasonable doubt, rather than merely satisfying the preponderance standard. *Cunningham* v. *California*, 549 U.S. 270, 281 (2007).[2]

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[2] In this case, the guilty plea may (or may not) have constituted a waiver of the right to a jury determination, but it would not

The role of *Apprendi* in Section 841 prosecutions has produced a deep circuit split. The central divide is whether drug quantity must be included in the indictment and proven to a jury beyond a reasonable doubt when that fact determines the sentencing range to which a defendant is subject and, by virtue of a mandatory minimum, increases the actual sentence. The lower court's decision sits on one side of a seemingly unbridgeable divide: it held that *Apprendi* requires drug quantity to be proven beyond a reasonable doubt only if the defendant is sentenced to greater punishment than the statutory maximum for an undetermined quantity (20 years), regardless of whether the finding compels the court to impose a mandatory minimum that exceeds the sentence it would otherwise impose. Other courts, however, require drug quantity to be proven beyond a reasonable doubt before the defendant may be subjected to a mandatory minimum sentence based on quantity. Looming over this disagreement is the uncertainty surrounding the meaning of the Court's fractured decision in *Harris* v. *United States*, 536 U.S. 545 (2002), as well as *Harris's* continued vitality in light of subsequent *Apprendi* cases such as *Blakely* v. *Washington*, 542 U.S. 296 (2004), and *United States* v. *Booker*, 543 U.S. 220 (2005).

Review is necessary because only this Court can resolve these important questions and clarify its ruling in *Harris*. The issues are exceptionally important because they affect many of the massive number of prosecutions under Section 841. They further merit the Court's attention because the lack of uniformity produces dramatic inequalities. For in-

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have altered the right to application of the reasonable doubt standard.

stance, a New York defendant in Clark's situation would have received a term of only 4 years, whereas Clark received a term of 10 years. Juries, which are perfectly capable of making factual determinations of drug quantity, should be entrusted with that task. Indeed, the constitutional imperatives of a right to a jury trial and to the protections inhering in the reasonable doubt standard demand it.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFUSION CLOUDING THIS AREA OF LAW.

The deep division among lower courts over the application of Section 841 (and other statutes featuring escalating ranges) merits this Court's attention. The lower courts cannot agree about the burden of proof imposed on the prosecution when a drug quantity finding would increase the punishment range by imposing an otherwise inapplicable mandatory minimum sentence. Intractably divergent answers to this question—overlaid by confusion about the meaning and vitality of *Harris*—have created an unfortunate knot that only this Court can untangle.

A. Courts Disagree About The Proper Burden Of Proof For Drug Quantity.

The requirements for establishing drug quantity vary by circuit on the basis of timing—when the *Apprendi* right attaches. Under the Second and Ninth Circuit view, drug quantity "must always be pleaded and provided to a jury or admitted by a defendant." *United States* v. *Gonzalez*, 420 F.3d 111, 131 (2d Cir. 2005); *United States* v. *Velasco-Heredia*, 319 F.3d 1080, 1085 (9th Cir. 2003). Regardless whether the actual sentence given exceeds the statutory maxi-

mum for unquantified amounts, these circuits do not allow a quantity-based sentence to be imposed without the *Apprendi* protections. *United States* v. *Thomas*, 274 F.3d 655, 663 (2d Cir. 2003) (en banc).

Under the contrary Seventh Circuit view, the status of drug quantity is not determined until *after* sentencing. Thus, *Apprendi* requires quantity to "be treated as an element" subject to *Apprendi* protections "only when it results in a sentence beyond the relevant statutory maximum." *United States* v. *Barbosa*, 271 F.3d 438, 457 (3d Cir. 2001); *United States* v. *Stark*, 499 F.3d 72, 80 (1st Cir. 2007) (drug quantity does not implicate *Apprendi* protections unless it "increase[s] the defendant's sentence beyond the applicable maximum penalty"). Whether a sentence is greater than the default maximum in (b)(1)(C) naturally cannot be known until after a sentence has been rendered.

The lower courts have also viewed their disagreement in terms of the possible sentencing ranges a defendant faces—in essence, whether a drug quantity finding subjects a defendant to a statutorily mandated minimum. The Second and the Ninth Circuits have held that drug quantity must be proven beyond a reasonable doubt because it may increase "a defendant's authorized sentencing range above what it would have been if he had been convicted of an identical unquantified drug crime." *Gonzalez*, 420 F.3d at 126; *Velasco-Heredia*, 319 F.3d at 1085 (a drug quantity finding that raises the range of minimum and maximum sentences triggers *Apprendi*).

The Seventh Circuit and other courts have adopted a contrary position. If the "the actual sentence imposed is less severe than the statutory maximum," *Apprendi* is not implicated. *United*

States v. *Williams*, 238 F.3d 871, 877 (7th Cir. 2001). So long as the resulting sentence does not exceed the default statutory maximum of 20 years, drug quantity "need not be alleged in the indictment and proved to a jury beyond a reasonable doubt." *United States* v. *Keith*, 230 F.3d 784, 787 (5th Cir. 2000) (per curiam). Thus, even if a drug quantity finding subjects the defendant to subsection (A) and increases the sentencing floor to 10 years—as it did for Clark—*Apprendi* plays no role because the resulting sentence falls below the 20-year ceiling of subsection (C).

Whichever rationale is most sound, it is undeniable that this issue recurs with great frequency and affects the sentences of many defendants, with dramatically different results depending only on the location of the prosecution. See Section II, *infra*. Moreover, the difference of opinion between the lower courts has become entrenched. Compare *United States* v. *Confredo*, 528 F.3d 143, 153 (2d Cir. 2008), and *United States* v. *Hollis*, 490 F.3d 1149, 1155 & n.3 (9th Cir. 2007) with *United States* v. *Price*, 516 F.3d 597, 605 (7th Cir. 2008); *United States* v. *Webb*, 545 F.3d 673, 677 (8th Cir. 2008); *United States* v. *Williams*, 464 F.3d 443, 449 (3d Cir. 2006). Only this Court's intervention can bring about needed uniformity.

B. The Split In The Lower Courts Squarely Implicates Lingering Confusion About The Meaning And Vitality Of *Harris*.

At the heart of the division described above is this Court's fractured decision in *Harris*. The uncertainty sparked by *Harris* about the constitutional differences, if any, between increased maximums and statutorily imposed minimums has largely driven the disarray in the lower courts. Rickey Clark's petition

presents the Court with an appropriate vehicle to resolve the uncertainty about whether *Apprendi* precludes the application of a preponderance of the evidence standard when it results in the imposition of a mandatory minimum.

Harris addressed 18 U.S.C. § 924, the federal firearm statute. The text and structure of the statute imposed escalating mandatory minimums depending on how a defendant possessed or used a firearm during a crime. *Harris*, 536 U.S. at 550-551. The Court addressed whether *Apprendi* applied to the aggravating factor, *i.e.*, whether the bundle of Fifth and Sixth Amendment rights governed the prosecution's effort to impose a higher mandatory minimum through a showing of brandishment or use of a firearm (or another aggravating factor). *Id.* at 556-566. While the Court held that Harris was not entitled to the benefit of a reasonable doubt determination by a jury, a majority of the Justices were of the view that there was no logical distinction under *Apprendi* between facts giving rise to a mandatory minimum sentence and those exposing the defendant to a higher maximum sentence. *Id.* at 550-551.

The *Harris* plurality concluded that "a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum)" was not an element, and thus *Apprendi* did not apply. 536 U.S. at 557. This view rested primarily on the Court's earlier holding in *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), which "sustained a statute that increased the minimum penalty for a crime, though not beyond the statutory maximum, when the sentencing judge found, by a preponderance of the evidence, that the defendant had possessed a firearm." *Harris*, 536 U.S. at 550. The plurality rejected the

notion that *Apprendi* had undermined *McMillan*. *Id.* at 565-567.

Justice Breyer joined in the Court's judgment, but only because he adhered to his underlying disagreement with *Apprendi*. *Harris*, 536 U.S. at 569 (Breyer, J., concurring in part and concurring in the judgment). Nonetheless, he could not "easily distinguish *Apprendi* * * * from this case in terms of logic" and did not "agree with the plurality's opinion insofar as it finds such a distinction." *Ibid.*[3]

The four dissenting Justices likewise and emphatically could not identify any constitutionally significant difference between findings that increased minimums and findings that increased maximums. They explained that "[t]he principles upon which [*Apprendi*] relied apply with equal force to those facts that expose the defendant to a higher mandatory minimum," because "[w]hether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed." *Harris*, 536 U.S. at 579 (Thomas, J., dissenting). Based on their under-

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[3] Justice Breyer foreshadowed this view years earlier. In *Apprendi*, he explained that "as a practical matter," a mandatory minimum "is far more important to an actual defendant," because while a judge can "select any sentence below a statute's maximum," he or she is bound by a statutory minimum. 530 U.S. at 563 (Breyer, J., dissenting). Thus, "all the considerations of fairness that might support submission to a jury of a factual matter that increases a statutory maximum, apply *a fortiori* to any matter that would increase a statutory minimum." *Ibid.*; see also Kevin R. Reitz, *The New Sentencing Conundrum*, 105 COLUM. L. REV. 1082, 1097 (2005) ("A mandatory minimum sentencing rule carries far greater significance for the actual punishment in most cases than the positioning of a theoretical maximum penalty.").

standing that *Apprendi* imposed constitutional limitations whenever "a particular fact shall give rise both to a special stigma and to a special punishment" (*Harris*, 536 U.S. at 575 (internal quotation marks omitted)), the dissenters concluded that the "fine distinctions" between facts increasing the statutory maximum and facts imposing a mandatory minimum "cannot withstand close scrutiny." *Id.* at 574.

The four dissenters also concluded that *McMillan* failed "to withstand the logic of *Apprendi*." *Harris*, 536 U.S. at 580. As they explained, *McMillan* directly contravened *Apprendi*, which focused on "any fact that increases or alters *the range* of penalties to which a defendant is exposed—which, by definition, must include increases or alterations to either the minimum or maximum penalties." *Id.* at 582. The dissent pointed to Justice Breyer's concurrence as further support for "the essential incompatibility of *Apprendi* and *McMillan*," noting that his view left "only a minority of the Court embracing the distinction" between the two cases. *Id.* at 583.

Perhaps understandably, the lower courts have not spoken in one voice when it comes to *Harris*. Whether *Harris* applies to defendants like Clark has become yet another point of division. The Second and Ninth Circuits have ruled that *Harris* does not apply where "drug quantity raises a mandatory minimum sentence" and "simultaneously raises a corresponding maximum, thereby increasing a defendant's authorized sentencing range above what it would have been if he had been convicted of an identical unquantified drug crime." *Gonzalez*, 420 F.3d at 126; see also *Velasco-Heredia*, 319 F.3d at 1085 (*Harris* is inapplicable because "the defendant was never *exposed* to a greater maximum sentence").

Other courts apply *Harris* to permit judicial findings of drug quantity if the resulting sentence "does not exceed the statutory maximum" under § 841(b)(1)(C). *United States* v. *Gonzalez*, 501 F.3d 630, 643 (6th Cir. 2007). Thus, courts differ over whether *Harris* even controls when a finding of drug quantity increases the statutory sentencing range.

This disagreement aside, six years of subsequent case law have called *Harris*'s vitality into question. *Apprendi* started with the holding that facts increasing a statutory maximum implicate the Sixth Amendment (*Apprendi*, 530 U.S. at 484), but the Court has subsequently applied the doctrine to "all the facts 'which the law makes essential to the punishment.'" *Blakely*, 542 U.S. at 304.

It is especially doubtful that *Harris* has survived *Booker*, particularly as applied to a defendant in Clark's shoes. In *Booker*, a drug quantity finding (under Section 841) increased the defendant's sentence from 21 years to a mandatory minimum of 30 years, just as the district court's finding here increased Clark's sentence from 4 years to a mandatory minimum of 10 years. *Id.* at 235. The Court held that *Apprendi* required a jury to make such a finding beyond a reasonable doubt. *Id.* at 235-237. The facts of *Booker* are functionally indistinguishable from those here—in both, a defendant was subjected to a mandatory minimum by virtue of a judge finding drug quantity by a preponderance of the evidence—and the result in both should be the same. Cf. *Cunningham*, 549 U.S. at 293 (striking down, by a 6-3 vote, a California sentencing scheme that permitted a sentence to increase from a "middle term" of 12 years to an "upper term" of 16 years based on

facts proven to a judge only by a preponderance of the evidence).

Observers of the Court have confirmed what five Justices noted in *Harris*: the Court's opinions have yet to offer a principled distinction between maximums and minimums. At least five circuits courts and a welter of academic commentary question whether *Harris* survived recent decisions like *Blakely*, *Booker*, and *Cunningham*. Pet. 26-28 & nn.6-7. Indeed, some have noted that those decisions "have eroded *McMillan* and *Harris* to such an extent that they are dubious at best and, more likely, no longer good law." Kirk J. Henderson, *Mandatory Minimum Sentences and the Jury*, 33 U. DAYTON L. REV. 37, 56 (2007).

There can be no doubt, in the wake of *Blakely* and *Booker*, that *Apprendi* is here to stay. At least five members of the Court believe that under *Apprendi*, there is no logical way to differentiate subjection to a higher minimum and exposure to a higher maximum. The continued refusal to apply *Apprendi* in this context simply makes no sense. As the Court ruled in *Blakely*, "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals.'" 542 U.S. at 301. It is unclear why a finding of drug quantity that exposed Clark to an otherwise inapplicable minimum sentence should be treated any differently.

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What is perfectly clear in any event is that the issues raised in the petition have engendered intractable controversy in the lower courts. The recurring nature of the issue, its practical importance, and the

depth of the division among the lower courts makes review appropriate at this time and in this case. Clark's experience crystallizes the key issue: the lower court sentenced Clark to a 10-year sentence pursuant to (b)(1)(A), instead of its preferred 4-year sentence, based on facts that satisfied the preponderance standard, but not the reasonable doubt standard. It is hard to imagine a more perfect vehicle to remedy the troublesome consequences of the discord among the lower courts.

II. THE DISORDER IN THE COURTS HARMS THE CRIMINAL JUSTICE SYSTEM.

The issues discussed above are exceptionally important in part because of the sheer number of people affected: prosecutions and sentences for drugs crimes, many of which involve imposition of mandatory minimum sentences, affect tens of thousands of criminal defendants every year. The lack of clarity about the governing rules creates unfair disparities for criminal defendants.

A. Drug Crime Prosecutions Dominate The Criminal Justice System.

Apprendi issues related to drug crimes affect a staggering number of people. In the year ending June 2007, the federal government commenced almost 19,000 cases charging drug offenses. Administrative Office of the U.S. Courts, *Statistical Tables for the Federal Judiciary 2007*, Table D-2 (Jun. 30, 2007), *available at* http://www.uscourts.gov/stats/june07/D02CJun07. pdf. Drug offenders accounted for more than 25,000 of the 72,865 defendants sentenced in 2007, fully 34 percent of all federal criminal cases and nearly 45 percent more sentences than the next closest category. United States Sentencing

Comm'n, *Sourcebook of Federal Sentencing Statistics*, Figure A (2007), *available at* http://www.ussc.gov/ANNRPT/2007/FigA.pdf. ("Sentencing Sourcebook"); *id.* at Table 3, *available at* http://www.ussc.gov/ANNRPT/2007/Table3.pdf.

The imposition of mandatory minimums is a constant in sentences for drug crimes. Approximately 70 percent of drug convictions result in the application of mandatory minimum sentences. Sentencing Sourcebook, Table 43, available *at* http://www.ussc.gov/ANNRPT/2007/Table43.pdf. In 2007 alone, just over 7,000 five-year and nearly 10,000 ten-year mandatory minimum sentences were meted out. *Ibid.* The imposition of mandatory minimums undoubtedly raises the average sentence for drug trafficking crimes, which is 83.2 months (nearly seven years). *Id.* at Table 13, available *at* http://www.ussc.gov/ANNRPT/2007/Table13.pdf. In short, the issues in Clark's petition affect the trials and sentences of thousands of criminal defendants in the federal courts, directly impacting their lives and the lives of their families.

B. The Lack Of Uniformity Is Problematic On A Systemic And Individual Level.

The division of views among the lower courts creates unfortunate disparities that justify review. Under the status quo, a defendant in Albany or Seattle is bound by a different set of rules from one in Chicago or El Paso. Whereas the prosecution in the Second or Ninth Circuit will have to plead drug quantity in the indictment and prove it to the jury beyond a reasonable doubt in order to secure a sentence under subsection (A), the prosecution in other circuits may omit quantity from the indictment and

prove it to a judge under a preponderance standard. See *supra* Section I.

In the past, the Court has granted review to resolve sentencing conflicts between the circuits. *Castillo* v. *White*, 530 U.S. 120, 123-24 (2000); *Edwards* v. *United States*, 523 U.S. 511, 513 (1998); *Witte* v. *United States*, 515 U.S. 389, 395 (1995). The desire to address such differences reflects the "fundamental principle" of the Constitution "that a single sovereign's law should be applied equally to all." Justice Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 4 (1985). That principle requires "uniformity of decisions throughout the whole United States, upon all subjects within [its] purview." *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816).

In the "federal criminal law" context, there is an imperative "for uniformity and consistency." *Tafflin* v. *Levitt*, 493 U.S. 455, 464-465 (1990) (internal citations omitted). The absence of uniformity creates an "unfortunate disparity in the treatment of similarly situated defendants," which "'hardly comports with the ideal of administration of justice with an even hand.'" *Teague* v. *Lane*, 489 U.S. 288, 305, 315 (1989), quoting *Hankerson* v. *North Carolina*, 432 U.S. 233, 247 (1977). In words that resonate strongly here, Justice White explained:

> The statute at issue defines a federal crime, and it should be applied uniformly throughout the United States. Yet, because of conflicting interpretations, defendants in some parts of this country may be punished for violations without proof or pleading of an element required in another judicial circuit. Criminal culpability for violation of federal

> statutes should turn on uniform law, not geography.

Wilkes v. *United States*, 469 U.S. 964, 965 (1984) (White, J., dissenting from denial of certiorari).

The disparity here is profound. Clark's sentence jumped from 4 years to the mandatory minimum of 10 years based on shaky evidence that was not "sufficient to sustain a decision beyond a reasonable doubt." Pet. App. 24a. It should be unsettling that Clark will have to wait six more years "to resume the positive aspects of his past life" on the basis of the murky testimony of a convicted drug dealer whose memory of the quantities involved was not, in the district court's view, "good enough to send somebody away for." Pet. App. 4a.

It should be equally alarming that this result is a function of nothing more than location. Had Clark been prosecuted in New York or Los Angeles, the mandatory minimum would not have applied because the government failed to plead and prove drug quantity beyond a reasonable doubt. *Gonzalez*, 420 F.3d at 115. A judge sitting in the Southern District of New York or Central District of California would not have been obligated by Section 841 to sentence Clark to a 10-year sentence.

While the difference for Clark is measured in years, the disparity may be measured in decades in other situations. Had Clark been previously convicted of a felony drug crime, the drug quantity finding would have doubled the minimum sentence (to 20 years). Yet, a similarly situated Ninth Circuit defendant would not be subject to any minimum sentence. Compare 21 U.S.C. § 841(b)(1)(A)(viii) with *id.* § 841(b)(1)(C).

These differentials are entirely real. In *Gonzalez*, drug quantity was proven by a preponderance of the evidence, but not beyond a reasonable doubt. 420 F.3d at 118. The defendant had a prior conviction, and thus would have been subject to a 20-year minimum. *Id.* at 131. Because the defendant committed his crime in New York instead of Chicago, however, he was subject to no mandatory minimum.

Similarly, in *Velasco-Heredia*, the district court found, by a preponderance of evidence, a drug quantity of 285 kilograms of marijuana even though the government had proven a quantity of only 18 kilograms beyond a reasonable doubt. 319 F.3d at 1083-1084. The Ninth Circuit held that the defendant accordingly could not be sentenced to more than five years without violating *Apprendi*. *Id.* at 1085. By contrast, in the Seventh Circuit, a defendant in identical circumstances could not serve *less* than five years.[4]

Such disparities should be intolerable. They offend the uniformity that anchors the criminal justice system. *Tafflin*, 493 U.S. at 464-465. And they con-

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[4] As *Velasco-Heredia* demonstrates, sentences involving marijuana, which account for 25 percent of all drug sentences (Sentencing Sourcebook, Table 43), present stark disparities. Assume the government can prove beyond a reasonable doubt that the crime involved 50 kilograms of marijuana, but only by a preponderance of the evidence that the crime involved 1,000 kilograms of marijuana. A Chicago federal court will have to impose a 10-year sentence, but a Los Angeles federal court cannot impose a sentence of more than 5 years. Compare 21 U.S.C. § 841(b)(1)(A)(viii) with *id.* at § 841(b)(1)(D). The accident of geography thus results in identical evidence producing a *minimum* sentence in Chicago that is *twice* the maximum sentence in Los Angeles.

travene the principles of fairness that even *Apprendi*'s detractors realize lie at the intersection of the Fifth and Sixth Amendments. *Blakely*, 542 U.S. at 345-346 (Breyer, J., dissenting). Review is needed to eliminate these disparities that bedevil the application of Section 841.

III. JURIES ARE WELL-EQUIPPED TO MAKE FINDINGS REGARDING DRUG QUANTITY.

Leaving the determination of drug quantity in the capable hands of juries is both constitutionally mandated and pragmatically preferable. The basis of *Apprendi* is "the need to give intelligible content to the right of jury trial." *Blakely*, 542 U.S. at 305. That right, this Court has held, "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Id.* at 305-306. It ensures the people's "control in the judiciary," and *Apprendi* bolsters this balance of power "by ensuring that the judge's authority to sentence derives wholly from the jury's verdict." *Id.* at 306. The Seventh Circuit's rule, however, removes drug quantity from the jury, stripping it of its reasonable doubt safeguard, and places the determination in the hands of a judge, under a less stringent standard.

While the jury trial right "does not turn on the relative rationality, fairness, or efficiency of potential factfinders," *Ring* v. *Arizona*, 536 U.S. 584, 607 (2002), the lower court's rule ignores that juries are particularly capable of deciding a question like drug quantity. In many instances, a drug quantity determination will come down to witness credibility; in the absence of seized drugs that can be weighed, the government may often have to prove quantity by calling witnesses to testify about how much of the drug the defendant bought or sold. For Clark, the

credibility of a single witness meant the difference between a 4-year sentence and a 10-year sentence. While the district court did not believe the testimony was sufficient to "sustain a decision beyond a reasonable doubt," it held that the testimony satisfied a more-likely-than-not threshold. Pet. App. 24a.

A jury is well-equipped to rule upon a quantity witness's credibility. Indeed, such determinations are in its wheelhouse: the jury has a "core function of making credibility determinations in criminal trials." *United States* v. *Scheffer*, 523 U.S. 303, 312-13 (1998). "A fundamental premise of our criminal trial system is that 'the *jury* is the lie detector,'" proficient at "[d]etermining the weight and credibility of witness testimony" because of its "'practical knowledge'" of people. *Id.* at 313; cf. *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) ("credibility determinations * * * 'are jury functions, not those of a judge'"); *Markman* v. *Westview Instruments, Inc.*, 517 U.S. 370, 389 (1996) (credibility determinations "are the jury's forte"); *Taylor* v. *Illinois*, 484 U.S. 400, 430 n.5 (1988) (discussing the jury's "central function of assessing the credibility of witnesses"). This core ability is particularly critical in drug quantity cases: because "the use of informers, accessories, accomplices, [and] false friends . . . may raise serious questions of credibility," defendants like Clark should be "entitled to broad latitude to probe credibility by cross-examination and to have the issue[] submitted to the jury with careful instructions." *On Lee* v. *United States*, 343 U.S. 747, 757 (1952).

Avoiding the false distinction between mandatory minimums and maximums that five Justices have recognized as indefensible allows juries to do what they do best. By requiring drug quantity to be

proven beyond a reasonable doubt, the rule not only satisfies the constitutional guarantee of the right to a jury trial, but assigns the key task of finding drug quantity to the institution best suited to make that determination. It does so while applying an essential protection of the criminal justice system to a critical aspect of the criminal process. The Seventh Circuit's rule is to the contrary, and it should not stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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